(18,471.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 288.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LAURA LOUISE McDADE, LUCY W. McDADE, AND KINNEY McDADE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1903.

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a United States Circuit Court of Appeals, Sixth Circuit.

THE CHOCTAW, OKLAHOMA & GULF R. R. Co., Plaintiff in Error,
vs.
MRS. LAURA LOUISE MCDADE, LUCY W. MCDADE, and Kinney McDade, Defendants in Error. } No. 982.

Error to the circuit court of the United States for the western district of Tennessee.

Record.

Original transcript filed May 25, 1901.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, in the following cause, to wit:

MRS. LAURA LOUISE MCDADE, LUCY W. MCDADE, and Kinney McDade, all Minors, Plaintiffs,
vs.
CHOCTAW, OKLAHOMA & GULF RAILROAD Co., Defendant. } No. 3574.

Watson & Fitzhugh, of Memphis, Tenn., for plaintiff-.
Wright, Peters & Wright, of Memphis, Tenn., for defendant.
Judgment by Judge E. S. Hammond.
No. 3574. Circuit court of the United States, western district of Tennessee. Laura L. McDade, *et al.*, *vs.* Choctaw, Oklahoma & Gulf R. R. Order of court. Entered and filed — day of ——, A. D. 190–. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

LAURA L. McDADE ET AL.
vs.
CHOCTAW, OKLAHOMA & GULF RAILROAD CO. } No. 3574.

Transcript from the Cir. Ct. of Shelby Co., Tenn. Filed in U. S. Cir. Ct., W. D. T., Oct. 4, 1900.

STATE OF TENNESSEE:

2 Pleas at a term of the circuit court of Shelby county, State aforesaid, begun and held at the court-house in the city of Memphis, on Monday, the 17th of September, 1900, the same being the third Monday in September, 1900.

Present and presiding, the Hon. L. H. Estes, judge, etc., also present L. E. Boswell, clerk of said court, and Geo. W. Blackwell, sheriff of Shelby county, when the following proceedings were had, to wit:

Cost Bond.

LAURA L. McDADE ET AL.
vs.
CHOCTAW, OKLAHOMA AND GULF R. R. CO.

I bind myself to the defendant in the sum of two hundred and fifty dollars for the successful prosecution of this action, to be void on condition that I pay all the costs which may at any time be adjudged against the plaintiffs in the event that they shall not pay the same, otherwise to remain in full force.

Witness our hands this 11th day of September, 1900.

WATSON & FITZHUGH. [SEAL.]

Summons.

State of Tennessee to the sheriff of Shelby county, Greeting:

You are hereby commanded to summon the Choctaw, Oklahoma and Gulf Railroad Company, if to be found within your county, personally to be and appear before the judge of the circuit court of Shelby county, at a term of said court to be held for said county, at the court-house, in the city of Memphis, on the third Monday in September next, then and there to answer Laura Louise McDade, Lucy Woulland McDade and Kennie McDade, all minors without a guardian, who sue by their mother and next friend, Bettie C. McDade, and Bettie C. McDade, in her own right, in an action to their damage in the sum of twenty-five thousand dollars. Herein fail not, and have you then and there this writ.

Witness L. E. Boswell, clerk of said court, at office, the third Monday in May, 1900.

L. E. BOSWELL, *Clerk.*

3 Issued 11th day of September, 1900.

L. E. BOSWELL, *Clerk.*

Came to hand 11th day of September, 1900, executed same day on the Choctaw, Oklahoma & Gulf R. R. Company, by reading this writ to M. C. Adams, local freight agent, he being the highest officer of said railroad company to be found in my county, upon whom to serve this writ.

Sept. 11th, 1900.

GEO. W. BLACKWELL, *Sheriff,*
By A. SNOWDEN, *D. S.*

Declaration.

Filed September 18th, 1900.

In the Circuit Court of Shelby County, Tennessee.

LAURA LOUISE MCDADE ET AL.
vs.
THE CHOCTAW, OKLAHOMA & GULF RAILROAD CO.

The plaintiffs, Laura Louise McDade, Lucy Woulla[illegible] McDade and Kennie McDade, all minors, without a guardian, who sue by their mother and next friend, Bettie C. McDade, and Bettie C. McDade in her own right, sue the defendant, The Choctaw, Oklahoma & Gulf Railroad Company, for twenty-five thousand dollars ($25,000.00) damages, and for cause of action say: That the said defendant is a railroad company, owning and operating a line of railroad for the transportation of freight and passengers between the city of Memphis, State of Tennessee, and the city of Little Rock, in the State of Arkansas. That on or about the 19th day of August, 1900, John I. McDade was in the employ of said defendant company as brakeman on one of its trains, that about 1.30 o'clock a. m. on said day, while he was on the top of one of the cars of one of defendant's freight trains, in the discharge of his duty as brakeman, and in a position where he was expected to be, and without any negligence on his part, the said John I. McDade, at the time when said freight train, drawn by one of the defendant's engines, was moving at
4 a high rate of speed, on and over the track of the said defendant railroad, was violently struck and knocked off the said freight car by the iron spout suspended from one of the defendant's water tanks, at or near the town of Goodwyn, in St. Francis county, Arkansas, and received severe injuries from which death ensued after a few hours of great pain and suffering. Plaintiffs aver that after said John I. McDade was thus knocked off of one of defendant's moving trains, while in the discharge of his duty, by reason of the failure of the said defendant company to provide a safe and suitable place in which he might discharge his duty, and after the defendant company became aware of the fact that the said John I. McDade was missing from said train, which knowledge came to said defend-

ant a few minutes after the said McDade had received his mortal injury, said company declined to permit any of the co-employés of said McDade on said train to go back for him, but left him for several hours, without giving him any aid or succor whatever. Plaintiffs say that the defendant railroad company was guilty of gross negligence in permitting said water spout to be and remain suspended so low over their said track, over which its trains were being propelled, as to endanger the life of the said John I. McDade. That the said defendant company was guilty of gross negligence in failing to provide the suitable chains, pulley, etc., by which said spout could be hoisted back into an upright or perpendicular position, and so remain when not in use, and the said defendant company was negligent in the matter of the construction, maintenance of and failure to inspect said spout, and to see that it was kept in proper position. And plaintiff- aver that the death of the said John I. McDade was proximately caused by said negligence, and that at the time that he received the injury which resulted in his death he was in the discharge of his duty as brakeman, riding on the top of said freight car and was exercising all due care and prudence, and that the danger caused by said overhanging spout was unknown to him at the time. Plaintiffs aver that the said Laura Louise McDade, Lucy Woullard McDade and Kennie McDade, are the only surviving children and heirs-at-law of the said John I. McDade, and that the said Bettie C. McDade is his surviving widow, and that the said John I. McDade died intestate, and that there is no administrator or personal representative of his estate; that under the law of the State of Arkansas, in which State he was killed by reason of the negligence of defendant company, a right of action has accrued to said plaintiffs for his wrongful death; and that under the act of the General Assembly of the State of Arkansas, of March 6, 1883, embodied in sections 5911–5912 of Sandel & Hill's Digest of the Statutes of Arkansas, the said defendant railroad company is liable to plaintiffs for such damages as may constitute fair and just compensation to plaintiffs for the great loss sustained by them by reason of the death of the said John I. McDade.

Plaintiffs aver that the said John I. McDade was at the time of his death a young man, 27 years of age, of robust constitution and excellent moral character. He was earning $65.00 per month, was faithful and efficient in the discharge of his duties, and by reason of his experience and capacity had bright prospects for promotion and a larger income; that the plaintiffs were entirely dependent upon him for their support and maintenance; that as a result of his said death caused solely by the wrongful acts and negligence of the defendant company, plaintiffs have suffered irreparable loss.

Wherefore, they sue the said defendant railroad company for twenty-five thousand dollars, and demand a jury to try the issues to be joined.

WATSON & FITZHUGH,
Attorneys for Plaintiffs.

Petition for Removal.

Filed Sept. 18th, 1900, after Dec'l.

LAURA LOUISE MCDADE, LUCY WOULLARD MCDADE, and KENNEY McDade, by Their Next Friend, Bettie C. McDade, and Bettie C. McDade in Her Own Right,

vs.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY.

To the Honorable L. H. Estes, judge of the circuit court of Shelby county, Tennessee:

Your petitioner, The Choctaw, Oklahoma & Gulf Railroad Company, would show unto your honor that it is the defendant in the above-entitled action; that said action has been commenced
6 against it in this court by the said plaintiffs; and that said action is of a civil nature; and that said plaintiffs in the complaint herein claim in substance, that on or about the 19th August, 1900, John I. McDade, who was then in the employ of the said defendant company, was killed through the negligence of the defendant company; and that the said plaintiffs, Louise McDade, Lucy Woullard McDade, and Kennie McDade, are the only surviving children and heirs-at-law of the said John I. McDade, and that the said Bettie C. McDade is his surviving widow; that under the laws of the State of Arkansas, in which State he was killed, a right of action has accrued to said plaintiffs for the said wrongful death. Your petitioner would further show that it disputes said claim, and denies all liability under the claim set out in the complaint herein; that the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs; and avers that said plaintiffs have brought suit against said defendants for the sum of $25,000.00.

The defendant company further avers that at the commencement of this suit, the plaintiffs were then and still are citizens and residents of the State of Tennessee, and that your petitioner was then and still is a corporation organized under and by virtue of certain acts of the Congress of the United States, to wit, under the acts to incorporate the Choctaw Coal & Railroad Company, approved February, 1888, chap. 13, vol. 25, Stat. at Large (amended February 13, 1989); chap. 152, vol. 25, also amended Aug. 24th, 1894, chap. 350, vol. 28; also amended Ap'l 24, 1896, chap. 122, and that this is a suit arising under the laws of the United States, within the meaning of the 2d section of an act of Mar. 3d, 1875 (18 Stat. at L. 470, chap. 137), as amended by the acts of Mar. 3d, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866), and that the time for your petitioners, as defendants, in this action to answer or plead to the complaint has not yet expired, and your petitioners have not yet filed or in any way appeared herein. Your petitioner herewith presents a good and sufficient bond as provided by the statute in such cases, that they will, on or before the next en-

suing session of the United States circuit court for the western division of the western district of Tennessee, file there a transcript of the record of this action, and for the payment of all costs which may be awarded by the said court, if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners pray that this court proceed no further
7 herein, except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for the said court, as provided by law, and as in duty bound your petitioner will ever pray.

CHOCTAW, OKLAHOMA & GULF R. R. CO.,
By E. E. WRIGHT, *Att'y.*

Affidavit. Filed Sept. 18th, 1900.

STATE OF TENNESSEE, }
County of Shelby. }

M. C. Adams, being duly sworn according to law, deposes and says that he is the local freight agent of the Choctaw, Oklahoma & Gulf Railroad Company, and that he has read the said petition, and that the same is true to the best of his knowledge, except such matters as are therein stated on information and belief, and as to such statements he believes them to be true.

M. C. ADAMS, *Agent.*

Subscribed and sworn to before me Sept. 18th, 1900.

L. E. BOSWELL, *Clerk.*

Affidavit. Filed Sept. 18, 1900.

Affidavit. Filed Sept. 18th, 1900.

STATE OF TENNESSEE, }
County of Shelby. }

E. E. Wright, being duly sworn, on oath says, that he is one of the attorneys of the defendant company in the above-entitled cause of the petitioner named in the foregoing petition; that he has read the same and believes the same to be true; and affiant further says that said petitioner is absent from and is a non-resident of the county of Shelby, State of Tennessee, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from, and is a non-resident of the county of Shelby, State of Tennessee, in which said suit is brought.

E. E. WRIGHT.

Subscribed and sworn to before me Sept. 18th, 1900.

L. E. BOSWELL, *Clerk.*

8 *Bond. Filed Sept. 18th, 1900.*

LAURA LOUISE MCDADE, LUCY WOOLARD MCDADE, and KENNEY McDADE, by Their Next Friend, Bettie C. McDade, and Bettie C. McDade, in Her Own Right,

vs.

THE CHOCTAW, OKLAHOMA & GULF R. R. Co.

Know all men by these presents, that we, The Choctaw, Oklahoma & Gulf Railroad Company, as principal, and E. E. Wright and M. C. Adams, as sureties, residents and citizens of the county of Shelby, State of Tennessee, are held and firmly bound unto Laura Louise McDade, Lucy Woolard McDade and Kenney McDade, by their next friend, Bettie C. McDade, and Bettie C. McDade, in her own right, plaintiffs in the above-entitled cause, their successors and assigns, in the sum of ($500.00) five hundred dollars, lawful money of the United States of America, for the payment of which well and truly to be made we and each of us bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents. But the conditions of this obligation are such, that whereas, the said Choctaw, Oklahoma & Gulf R. R. Co. has applied by petition to the circuit court of the State of Tennessee, in and for the county of Shelby, for the removal of a certain cause therein pending, wherein Laura Louise McDade, Lucy Woolard McDade and Kenney McDade, by their next friend, Bettie C. McDade, and Bettie C. McDade, in her own right, are plaintiffs, and the said Choctaw, Oklahoma & Gulf R. R. Co. is defendant, to the circuit court of the United States for the district of Tennessee, western division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in the said action in said circuit court of Shelby county, Tennessee, be stayed.

Now therefore, if your petitioners, the said Choctaw, Oklahoma & Gulf R. R. Co., shall enter in said circuit court of the United States for the district of Tennessee, as aforesaid, on or before the first day of the next regular session a copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said circuit court of the United States, if said court shall
9 hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

E. E. WRIGHT.
M. C. ADAMS.

Bond examined and approved.

L. H. ESTES, *Judge.*

Order of Removal.

September Term, 1900.

TUESDAY, *September* 25, 1900.

In the Circuit Court of Shelby County, Tenn.

LAURA L. McDADE ET AL.
vs.
THE CHOCTAW, OKLAHOMA AND GULF R. R. Co. } 7115, A. D.

The defendant, The Choctaw, Oklahoma & Gulf Railroad Company, by their attorney, presented in open court this day their petition for removal *in* this cause from this court to the circuit court of the United States, for the western division of the western district of Tennessee, and also a bond with good and sufficient surety in the penal sum of five hundred dollars ($500.00), conditioned as required by act of Congress in such cases made and provided. Now, therefore, it is ordered and adjudged by the court that said petition be granted; that said bond, which has been duly approved in open court, be accepted, that this suit be removed from this court to the circuit court of the United States for the western division of the western district of Tennessee, at Memphis, that the clerk of this court duly transmit to that court a full, true and perfect copy of the record in this suit, duly certified according to law; and that all other proceedings in this court be stayed.

STATE OF TENNESSEE:

I, L. E. Boswell, clerk of the circuit court of Shelby county, hereby certify that the foregoing 12 pages of words and figures contain a full, true and complete transcript of all the words and proceedings had in the suit therein named wherein Laura L. McDade, *et al.*, are the plaintiffs and Choctaw, Oklahoma & Gulf R. R. Co. the defendant, as the same appears of record and on file in my office.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at my office, in the city of Memphis, Shelby county, this the 4th day of October, 1900.

[L. S.]

L. E. BOSWELL, *Clerk*,
By WM. RIESSER,
Deputy Clerk.

Circuit Court of the United States, Western District of Tennessee.

LAURA LOUISE MCDADE ET AL., by Their Next Friend,
vs.
CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY.
No. 3574. Pleas.

Filed Nov. 30, 1900.

The defendant, The Choctaw, Oklahoma & Gulf Railroad Company, a corporation chartered under the acts of Congress of the United States, comes, and by its attorneys, and in answer to the declaration heretofore filed herein, says it is not guilty of the charges of negligence therein set forth, and all other matters as set forth in the said declaration, and of this it puts itself upon the country. And for further plea in its behalf the defendant pleads that the wrongs and injuries set forth in the declaration of the plaintiff were proximately contributed to, and caused by the want of ordinary care upon the part of the plaintiff's intestate, and this it is ready to verify.

E. E. WRIGHT,
Att'y for Defendant.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

11 Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1901, at the United States court-house in the city of Memphis, in said district, on, to wit: the 18th day of January, A. D. 1901, in the following cause, to wit:

LAURA L. MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF R. R. Co., Defendant.
No. 3574.

By the agreement of counsel and for satisfactory reasons to the court appearing this cause is hereby set for hearing on January 28th, 1901.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura L. McDade *et al. vs.* Choctaw & etc., R. R. Co. Order of court. Entered and filed 18 day of January, A. D. 1901. John B. Clough, clerk, by W. B. Weisiger, deputy.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 29 day of January, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came the parties to this suit, by their respective attorneys, and came also a jury of good and lawful men, to wit: J. T. Frost, Henry Murphy, Chris Lutz, Chas. Danheiser, Chas. N. Pettys, W. F. Taylor, A. D. Gwynne, T. V. Brady, W. S. Webb, Fred Barnes, T. C. Phelan and O. L. Green, who were duly elected, empaneled, tried
12 and sworn well and truly to try the issues herein joined and a true verdict render according to the law and the evidence when the trial of this suit was commenced, and there not being time to complete the same today the further consideration thereof is hereby postponed until tomorrow morning.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 29 day of January, A. D. 1901. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 30 day of January, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit, by their respective attorneys, and came again also the jury heretofore empanelled and sworn herein on yesterday, when the trial of this suit was resumed, and there

not being sufficient time to complete the same today, the further consideration thereof is hereby continued until tomorrow morning.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 30 day of Jan'y, A. D. 1901. John B. Clough, clerk.

13 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 31 day of January, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit, by their respective attorneys, and came again also the jury heretofore empanelled and sworn herein, when the trial of this case was again resumed, and there not being sufficient time to complete the said trial today, its further continuance is hereby postponed until tomorrow morning.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 31 day of Jan'y A. D. 1901. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 1st day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

14 Came again the parties to this suit, by their respective attorneys, and came again also the jury heretofore empanelled

and sworn herein, when the trial of this suit was again resumed when there not being sufficient time to complete the same today the further consideration thereof is hereby postponed until to-morrow morning.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 1st day of Feb'y A. D. 1901. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 2d day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit, by their respective attorneys, and came again also the jury heretofore empanelled and sworn herein, when the trial of this suit was again resumed, when there not being sufficient time to complete the same today, the further consideration thereof is hereby postponed until Monday morning next.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 2d day of Feb'y A. D. 1901. John B. Clough, clerk.

15 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit: the 4 day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came the parties to this suit, by their respective attorneys, and came also the jury heretofore empanelled and sworn herein, whereupon by agreement of counsel for plaintiff-, and defendant, made in open court, it is ordered that as a mark of respect to the memory of John Marshall, Chief Justice of the Supreme Court of the United States, today being the centenary anniversary of his accession as Chief Justice, further consideration of this case is hereby postponed until tomorrow morning at ten o'clock, and the jury herein are excused until that time.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade *et al. vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 4 day of Feb'y, A D. 1901. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United
16 States court-house in the city of Memphis, in said district, on, to wit: the 6 day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit, by their respective attorneys, and came again also the jury heretofore empanelled and sworn herein, when the trial thereof was again resumed, and the jury having heard the testimony, listened to the arguments of counsel and received the charge of the court, upon their oaths do say they find the issues herein joined to be in favor of the plaintiffs and against the said defendant, and that they assess the amount of the plaintiffs' damages and recovery herein at the sum of five thousand dollars. It is, therefore, considered by the court that the said plaintiffs, Laura McDade *et al.*, do have and recover of and from the said defendant, Choctaw, Oklahoma and Gulf Railroad Company, said sum of five thousand dollars and the costs of this suit, for the collection of which execution is hereby awarded.

In the United States Circuit Court for the Western Division of the Western District of Tennessee.

LAURA L. McDADE ET AL., by Their Next Friend,
vs.
THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY. } No. 3574.

Bill of Exceptions. Filed April 29th, 1901. *J. B. Clough, Clerk.*

Bill of exceptions.

This cause came on to be tried in the above court before E. S. Hammond, circuit judge, and a jury, where the following proceedings were had, to wit:

The plaintiff, in order to sustain the issues upon her part, introduced the following evidence:

17 Mess. Watson & Fitzhugh, attorneys for plaintiff.
Mess. Wright, Peters & Wright, attorneys for defendant.

It was agreed by counsel that the statement of Stevens, undertaker, might be used in lieu of his evidence, subject to exceptions as to incompetency and irrelevancy, which, it was agreed the court might rule upon as same were presented.

Judge HAMMOND: "If the witness can be gotten here before the case is ended, you can put him on the stand."

Counsel for plaintiff read in evidence the statement of R. S. and A. L. Stevens, as follows:

R. S. Stevens, A. L. Stevens, Forest City.

The remains of McDade reached Forest City on early passenger train due here August 19th, 1900, about 4 o'clock. Was about 8 o'clock when we saw remains. A. L. Stevens met train. The remains bore evidence of a powerful (the word powerful being objected to) blow in chin. The jaw-bones, on both sides, broken all to pieces. We felt them in both sides, and the fluid in brachial artery came out of mouth (showing ruptured blood-vessels in that portion of head). We had to quit that as there was a leak in arteries. We had to go to the caroted artery. There was a slight wound in left side of head near rear, did not amount to much. Chin was cut clean through to bone. The bones of jaw were completely crushed.

Shirt all bloody in front and on his neck there was blood from chin.

Plaintiff's Evidence.

Mrs. LAURA L. McDADE, being duly sworn, first testified as follows:

Direct examination:

Q. Mrs. McDade, are you the widow of John I. McDade?
A. I am.

Q. When did you last see your husband alive?
A. On Saturday morning, August 18, 1900.
Q. In what business was he engaged at that time?
A. Brakesman on the Choctaw, Oklahoma & Gulf.
Q. How long had he been a brakesman on that road?
18 A. Since the last of June, I think, about the 24th or 25th, 1900.
Q. With what road had he been employed, if any, prior to that time?
A. He had been a conductor on the Illinois Central out of Memphis for six years, he had worked for the road about 12 years. After that on the Texas Pacific running to Fort Worth, Texas, before he went to Little Rock.
Q. Mrs. McDade, what was your husband earning at that time?
A. $70.00 a month.

Mr. WRIGHT: "That is objected to, unless she knows of her own knowledge."
Said objection was overruled by the court, to which ruling defendant duly excepted.

A. Well, they sent me a check——
Q. Who did?
A. The Choctaw, Oklahoma & Gulf road, after he was dead, and I have that at home. It says this is for 12 days' work and that was for $37.75.
Q. They sent you a check for $37.75 which they said was for 12 days' work?
A. Yes, sir.

Mr. WRIGHT: "That is objected to on the ground that this does not show his earning capacity, but merely what he earned for twelve days."
Said objection was overruled by the court, and to said ruling defendant duly excepted.

Q. State, if you know, what he had been earning prior to this time before he became connected with the Choctaw road.
A. Well, when he was running as conductor from $90.00 to $100.00; some months he made more.

Mr. WRIGHT: "Objected to on the ground that it appears at the time of his death he was employed by the Choctaw road as brakeman."
Question withdrawn.

Q. What were his habits, Mrs. McDade?
A. His habits were good. He didn't have any bad habits at all. He smoked an old corn-cob pipe, but didn't drink or gamble or any thing like that.
Q. State what his character was so far as being industrious or the reverse was concerned.
A. Yes, he was very industrious.

Q. You say he did not drink at all?
A. No, not at all. Not even a glass of beer.
Q. How long had you been married to Mr. McDade?
A. It will be eight years in April.
Q. How many children have you?
A. Three.
Q. Give their ages?
Q. What are their ages?
A. Five, four [illegible] one.
Q. Two girls and a little boy?
A. All three girls.
Q. Mrs. McDade, please state to the jury when you first learned of the death of your husband.
A. It was the morning of the 19th, that was Sunday morning, of August, one of the callers, Jack Kennedy, come and told me that he had been knocked off the train.

Mr. WRIGHT: "We object to what was the occasion of the accident."
Said objection was sustained by the court.

Q. You heard it through Mr. Jack Kennedy?
A. Yes, sir.
Q. Was he connected at that time with the Choctaw?
A. He was at that time caller for the Oklahoma & Choctaw.
Q. What is a caller?
A. To notify the men that it was time to go out on a run.
Q. When did you last see your husband and state whether he was living or dead at the time.
A. That was Sunday, August 19th, when they brought him from Forest City to Memphis and we buried him Monday morning.
Q. He was brought to Memphis on August the 19th?
A. Yes, sir, Sunday night. They got here at half past seven.
Q. I wish you would state to the jury whether or not you looked at the body of your husband.
A. Yes, I looked at him and examined him.
Q. State, please, what, evidences of injury, if any, you saw and where these wounds, if any, were located.
A. His chin was all knocked and crushed to the bone, broken all to pieces. His teeth were all knocked out and the side of his face, his ear drum, was bursted.
Q. Which side?
A. The left ear and he had a place on the side of the head—a terrible bruise.
Q. What was the condition of his jaw-bone?
A. It was all to pieces, you could tell his cheek and jaw bone were fractured.
Q. You say that his ear——
A. Yes, sir, his ear was bursted.
Q. His left ear?
A. Yes, sir.
Q. And a blow on the chin?

A. He had a fearful blow on the chin. His chin was mashed all to pieces. The teeth were all out, they were in there but hanging just as loose as they could be.

Q. What other place did he have?

A. Place on his forehead, it looked like it might have been a little scrape or something. Still, they were all bad places.

Q. Did you touch his jaw yourself?

A. Yes.

Q. And the bones you say were all crushed?

A. Yes, you could just feel his face and tell that all the bones were mashed. His cheek-bones were broken all to pieces.

Q. Mrs. McDade, I wish you would state whether you and your children were dependent upon your husband's earning for support and maintenance?

A. We were entirely dependent upon him. Had no other support.

Cross-examination:

Q. Mrs. McDade, your husband was an experienced railroad man, wasn't he?

A. He had been working for the railroad ten or twelve years.

Q. He had worked on the Illinois Central road as conductor, I believe?

A. Yes, sir.

Q. And on the Texas Pacific as what?

A. Brakeman.

Q. And he worked for the Choctaw?

A. Yes, sir.

Judge HAMMOND: "How old was he?"

A. "Twenty-seven."

Q. Do you know whether he had to be a brakeman before he became a conductor on the Illinois Central?

A. Yes.

Q. He had been a brakeman on the Illinois Central and then conductor and then brakeman on the Texas Pacific?

A. Yes. That is the reason he went to the Choctaw. They promised to give a train the 1st of September.

Re-examination:

Q. You say his age was twenty-seven?

A. He would have been twenty-eight in September.

Q. State, please, what was the condition of his health at the time?

21 A. His health was good, he was in perfect health.

Q. A strong, robust man?

A. A strong robust man.

Q. Do you know his height?

A. Six feet one inch.

Q. He had no disease of any kind?

A. No. He was a young man, strong and healthy, and Saturday

morning when he went off he just looked splendid, better than I had seen him for a long time. His color was splendid.

And further saith not.

Dr. W. S. WEBB, being duly sworn, next testified as follows:

Direct examination:

Q. You have been sworn, Dr. Webb?
A. Yes, sir.
Q. What is your name?
A. W. S. Webb.
Q. Doctor, I believe you are a practicing physician?
A. Yes, sir.
Q. How long have you been engaged in the practice of your profession?
A. I graduated February 24th, 1891.
Q. Where?
A. Louisville.
Q. From the Louisville medical college?
A. Yes, sir.
Q. Is that a college of good standing?
A. Yes, sir.
Q. Have you been practicing since that time?
A. Right here in Memphis, yes, sir.
Q. Did you have occasion at that time to call to see the remains or the body of John I. McDade?

—. ——.

Q. I wish you would state to the jury what evidences of injury, if any, you saw on the body or face of the deceased?
A. I forget what time it was. It was some time last summer I think a little after 12 o'clock at night, when I got to Mrs. McDade's house in Chelsea, and he was in his coffin and I examined the best I could under those circumstances. I saw a wound, I am not positive, but I think on the left side of his head. I won't swear to that. That is to the best of my recollection. His ear was split and lip cut open and some of his teeth out, and he had a little
22 scalp wound on his forehead and one of his fingers were injured, the skin broken. He was rigid then and it was hard to tell.
Q. What kind of injury was that on the side of his head—the left side?
A. The lower part of his ear was broken open and the matter was oozing out, of it.
Q. What was the condition of his chin?
A. The chin was broken open but it was sewed up or plastered — some dressing. I don't remember positively whether it was stitched or plastered. The teeth was knocked out.
Q. Was it confined to the lip or did it extend down to the chin?
A. The chin—the whole thing. The teeth were knocked out too.
Q. The chin was cut open there and had either been sewed up or plastered up?

A. Yes, sir, I noticed it had been attended to—that is to the best of my recollection.

Q. And the matter was oozing out of the left ear?

A. Yes, sir.

Q. Doctor, have you, in your experience as a physician, had an opportunity to become familiar with injuries of this character and causes which would bring them about?

A. I don't exactly understand you.

Q. Have you, in your practice as physician and surgeon, had opportunity to become familiar with injuries of this character and causes which would bring them about?

A. I have seen a good many injuries. I am surgeon of the Iron Mountain R. R. Have been about five years.

Q. You have seen a great many injuries inflicted on railroad employés?

A. Yes, sir.

Q. Did you have occasion to pass upon these injuries and to examine persons injured frequently or infrequently?

A. A good many times for the last five years—I have been surgeon about five years.

Q. From your knowledge, as a practicing physician and surgeon acquired during the practice of your profession, and especially during the time that you have been a surgeon of the Iron Mountain railroad—please state whether or not the condition in which you found the deceased John I. McDade could or not have — produced by falling from a car?

23 Mr. WRIGHT: "That is objected to."

Judge HAMMOND: "The objection to the form of that question is good."

Q. You have stated that the deceased had a blow upon the left side of his face and that the cheek or the chin was cut open and that he also had a small wound on his forehead, I believe?

A. Yes, sir.

Q. Please state whether or not in your opinion, from your knowledge of such injuries, how many blows, if you are able to determine from your experience with such matters, would be required for the infliction of such injuries.

A. Well, he had a blow on the side of his head and a blow on the front of his head and a blow on the hand, and as far as my experience goes (I am not positive about this—it is just my experience) a man to fall—I don't hardly see——

Mr. WRIGHT: Objected to witness' answer.

Judge HAMMOND: "I think he should give a direct answer to the question asked by counsel."

A. Well, I think it takes two blows for his injury.

Q. Please state, Doctor, from your knowledge and experience of such things, whether a blow such as you found evidence of on the chin of the deceased is frequently or infrequently caused by the falling of the person?

Mr. WRIGHT: "That is objected to. The question that may be asked a physician is not what may or not cause an injury the only way I conceive is competent in this line of interrogation is what, in the opinion of the expert, did cause this injury, if he can give anything like a certainty upon it. The fact that a thing might have caused it, if we are going into the realm of speculation——

Question withdrawn.

Q. From your examination of these injuries which you found evidence of on the face and head of the deceased, please state what, in your opinion, produced said injuries.

A. Well, it was a blow or fall or something. He had external wounds. I don't know what caused it. It is simply impossible to say what caused it for I didn't witness it.

Q. Assuming that the deceased, shortly prior to his death, was riding on a freight train at or near Goodwin, Arkansas, and that he was found near the track shortly after the passage of the train on which he was riding, his position being on the side and on
24 top of a furniture car going east, and that, when found near the track, these wounds which you have described were on him. Please state what, in your opinion, produced those injuries.

Mr. WRIGHT: "That is objected to on the ground that it is not an expert question at all to ask a physician, because any layman upon the jury is just as competent to judge as to what would have produced a wound of that character as a physician would be, because he doesn't pretend to state that he has ever seen a man fall from the car or knocked from the car. That is the first ground of objection. Again it is objected to because there is no evidence in this case up to this time about Mr. McDade, where he was found and as to where he was riding."

Judge HAMMOND: "He may assume that, he isn't compelled to wait and put on his expert testimony until he has proved all his case."

Mr. WRIGHT: "There must be some evidence as Mr. Wharton and Greenleaf say."

Judge HAMMOND: "I think he may put a hypothetical case to the witness before undertaking to prove it. Of course, the court recognizes the fact that when he puts on expert testimony first, the court and counsel on the other side are deprived of the hypothesis, if the proof does not support these facts. I would suggest to Mr. Fisher, unless there is some emergency, it would be better for him to withdraw it and put *in* on after he has proved his case."

Mr. WRIGHT: The witness has already stated that he believes, and I think that is as far as counsel can go, that he believes these blows were caused by his falling off or being knocked off or something of that sort. It would be impossible for him to say how. That question is put to him in the face of the evidence—after he has stated that it would be impossible for him to say how it occurred.

Judge HAMMOND: "The trouble is Dr. Webb here occupies a dual relation. He is not only an expert witness, but he is intro-

duced as a physician who saw the person himself, and there is a class of testimony that Mr. Fitzhugh might very well produce now. Still, he is drawing the line rather closely to expert testimony, and, perhaps, the expert testimony of this witness should come later."

Cross-examination reserved.

Statement of A. L. Stevens and R. S. Stevens.

(The undertaker who took charge of Mr. McDade's remains, and both making the same statement was next offered in evidence by Mr. Fitzhugh.)

25 Mr. Wright agreed that the testimony of these parties would be the same as contained in said statement, but objected to the expression as to a "powerful blow," which objection the court overruled and said statement was read in evidence to the court and jury.

Mr. W. J. JORDAN, being duly sworn, next deposed as follows:

Direc texamination:

Q. Mr. Jordan, what is your business and where do you live?

A. I am a farmer and stock-raiser, and live at Goodwin, Arkansas.

Q. How long have you lived at Goodwin?

A. Thirteen years.

Judge HAMMOND: "Where is Goodwin, Mr. Jordan?"

A. "On the Choctaw road west of here about 59 miles."

Q. How far is Goodwin from Forest City?

A. Fourteen miles west of Forest City.

Q. Mr. Jordan, do you remember the occasion of which Mr. McDade, a brakeman, was killed at Goodwin, Arkansas?

A. I don't know anything about the killing. I heard of it.

Q. You remember the time?

A. Something about the time. It was in August some time. I don't remember the date.

Q. State whether or not there is a water tank, a railroad water tank, at Goodwin, Arkansas.

A. There is one there.

Q. Where is — located?

A. It is north of the track, the railroad track, there in the station west of the platform where the passenger trains stop.

Q. On what side of the railroad track is that water tank going west?

A. It would be on the right-hand side—north.

Q. Mr. Jordan, I wish you would describe as best you can to the jury the character of water tank there at Goodwin and what there is connected with it and what its use is.

A. I don't know. It is — water tank, has a spout attached to it as any other tank.

26 Q. Did you see this tank there shortly prior to the time you heard of the death of Mr. McDade?

A. Yes, sir.

Q. What was the position of the spout there—the water-spout connected with the pipe coming from the tank?

Mr. WRIGHT: "That is objected to, because he has not shown the time he saw it."

Judge HAMMOND: "Just ask him that question."

Q. How often did you see this tank?

A. I have saw the tank ever since I have been there. It has just been remodeled.

Mr. WRIGHT: "How long has it been since you have been there?"

A. I moved there the 7th of last December was thirteen years ago.

Q. State how often you saw it prior to August 19th, 1900, and how long before that time you saw it.

A. The way the tank is situated now has only been about a year.

To this answer Mr. Wright objected.

Judge HAMMOND: "All that he says about subsequent to this accident is ruled out."

A. Up to a year ago it was enclosed by a building or house around it. About a year ago they repaired it and taken this house away.

Q. How long before August 19th, assuming that was the date, of the death of Mr. McDade, was it you saw the tank and the spout?

A. I seen it all along every day. I seen it every day. I live right there in town, it is right there in two or three hundred yards of where I live.

Q. Did you see it the day before or a day or two before this accident or not?

A. I couldn't say that I saw it the day before, I couldn't say I did. I couldn't say sure that I went there and saw it the day before but it is there and I couldn't say that I went and looked at it.

Q. State whether or not you saw it shortly prior to this time—August 19th—made any observation.

A. Yes, sir, I suppose I could. I saw it right along pretty near. I couldn't say I saw it every day.

Judge HAMMOND: "When was the last time you saw it before this accident?"

A. "I couldn't say the date exactly."

Q. When was the last time you made any observation about it, how it was constructed, before this man was killed?

27 A. I couldn't say what date. I saw it every day or so. I couldn't say just the day.

Q. You saw it every few days?

A. Yes, sir.

Judge HAMMOND: "I think this witness has sufficiently stated his familiarity as to this tank. You need not waste any more time on that.

Q. I wish you would state to the jury in your own way how this spout was attached there to this tank and how it works.

Judge HAMMOND: "Can't you have Mr. Jordan tell us about the construction of the tank, whether it was lifted up or how it was?

Q. State the construction of the tank there—how it was built—shortly prior to the accident.

A. It is built upon truss-work, with a big tub, and this spout comes out, I couldn't tell you just what degree.

Judge HAMMOND: "It is upon slides, isn't it?"

A. "Yes, sir."

Q. How high up is it?

A. I think in the neighborhood of twelve feet from the ground to the spout. I couldn't say just exactly the feet.

Judge HAMMOND: "Did you ever measure how far it is from the rails?"

A. "Yes, sir, I couldn't just give the exact thing now."

Q. Have you got any memorandum?

A. No, sir, Mr. Walker has it. He and I taken it—helped take it.

Q. Is Mr. Walker here? One of the witnesses?

A. Yes, sir.

Q. State whether the memorandum handed you was made in your presence or not?

A. Yes, sir, it was.

Q. When was that measurement made?

A. On the 25th of September, 1900.

Q. Now Mr. Jordan, after refreshing your memory, give what measurements you have in regard to the distance of the tank on the projection on which this spout rests from the rail.

Mr. WRIGHT: "In what position was the spout?"

Mr. FITZHUGH: "Up when these measurements were taken."

Q. State whether the spout, when in position, rested against the tank or whether it was on framework. State how that was.

A. It was on framework, didn't touch the tank at all. This house was built around there and, instead of moving the tank out
28 to the track as near as the house was, they left it along there and the spout comes from the tank.

Mr. WRIGHT: "Was that before the accident that the house was moved?"

A. "Yes, sir." The spout doesn't touch the tank now at all. It is on framework, comes up between some upright pieces and has chains that support this pipe.

Q. How far is that upright piece from the tank?

A. I don't think we measured it but I would guess it was something about four feet from the tank.

Q. Then, the platform on which the tank rests, projects out further toward the track at the end of this platform where this framework is built?

A. Yes, sir.

Q. Explain to the jury how this spout is attached there to this framework.

A. Well, there is upright pieces and cross-arms and pulleys at each end of these cross-arms, and chains with weights on them at-

tached to the pipe. These weights rest on this platform that comes out from the tank.

Q. When the weights are resting on the platform that leaves the spout in the position in which it remains, doesn't it?"

A. Yes, sir.

Q. Can it go back any further towards the tank when the weights rest on the platform?

A. No, sir.

Judge HAMMOND: "The construction of this house around the tank the house supported the spout, and, since it has been changed, they have put a platform there to hold it?"

A. Yes, sir.

Judge HAMMOND: "Mark it down on the paper sketch. Mr. Wright contends that the platform wasn't a recent construction but was originally inside the house which was taken away."

WITNESS: "I can pretty near show you every plank in that platform."

Judge HAMMOND: "That's what we want you to do."

Witness makes the drawing and explains it to the jury as follows: This platform the tub rests on it. There is a floor projects out. These are upright pieces up here. This is the chain that goes down here. Here's is the weights. I made that for the spout. That raises right up there. These chains are attached to that spout and this extra point of pipe is attached to there and these chains here lower the pipe.

Q. You say this platform projects several feet from the tank?

29 A. Yes sir. That wasn't there until they moved the house from around the tank.

Q. What was the distance or is the distance from the bottom of that spout—dropping a line perpendicularly—to the ground—how far from the bottom of that line to the nearest rail?

A. I have it here.

Q. Dropping a line perpendicularly from the spout, that end of the spout where it connects with the pipe—that is, the lowest end of the spout to the ground—what is the distance from that line to the rail?

A. I couldn't say just how far it is. I don't remember and I don't think we took that distance. I don't see it. The spout is nine feet long and a perpendicular line from the bottom of that spout——

Q. What is the height of that spout above the ground?

A. It is about two feet. It would be something near two feet.

Q. Can't you look over that and see whether that is there or not?

Question withdrawn.

Q. Mr. Jordan, you say the spout was nine feet long?

A. Yes, sir.

Q. And the end of the spout where it connects with the pipe from the tank is about 12 feet from the ground?

A. Yes, sir.

Q. State whether or not, shortly prior to August 19, 1900, you had

made any observation as to the distance that this spout—the water spout—when up as high as it could go—that is when the weights were on the floor of the platform—over a passing freight car on that line.

A. I noticed the day that we measured the tank there was a brakeman on the train, and as the train pulled by he dodged the spout.

Mr. WRIGHT: "I ask that that be excluded."

Judge HAMMOND: "That is excluded. Strike it out."

Mr. FITZHUGH: "We may develop that this spout now is higher than it was at that time, and, in that event, this would be entirely competent."

Mr. WRIGHT: "We would have to determine what position the brakeman was in."

Judge HAMMOND: "Do you think it right to put before us the fact that a brakeman dodged the spout on a subsequent occasion to this?"

Mr. FITZHUGH: "Not unless the witness, with his own eye, was in position to determine whether it was necessary for him to dodge. It would be of the highest value, because it was a practical demonstration before his own eye. If the witness is there and sees that if the party had not dodged he would have been struck, it would be very strong evidence."

Judge HAMMOND: "My ruling is, where it is a question of measurements and distance, you can prove both the distance and measurements, but the dodging or actions of other people. That is an element of too much uncertainty. You might get a brakeman that knew and had full information and another that did not know that was more cautious and so on."

Mr. FITZHUGH: "My contention is simply this, your honor: If I am standing right there, looking at the train passing by, with a brakeman sitting on the edge of the car, just as the brakeman was sitting at this time, and see the brakeman passing by this spout, and, by looking at him and the spout at the same time, tell the distance of the spout not merely in inches or in feet, but as compared with the height of a man above the car—I contend that is competent evidence—not because the man dodges—that is not competent, unless the witness is able to see that his head would have come in contact with the spout, and, if he is able to state as to that, I think the evidence entirely competent."

Judge HAMMOND: "I don't think you can give specific instances of that character in proof here at all, and certainly not, where it is a mere question of putting a tape-line and measuring it. The objection is sustained."

And to the ruling of the court plaintiff duly excepted.

Mr. FITZHUGH: "Do you mean that such tests cannot be made?"

Judge HAMMOND: "Yes, you can prove your measurements, show the important facts, how far from the rail this structure is, and you can show the measurements of these cars and your furniture car, how far it comes over, all that, and then leave the jury to say from all these circumstances and the best testimony that you can get as

to the accuracy of the measurements, whether or not a man in the position your man was could be struck by that spout."

Q. State whether or not you made any observation in regard to the height of this water tank at Goodwin, Arkansas, when it was in the position where the weights were resting on the platform over the car.

Mr. WRIGHT: "What kind of a car—a car like this man was on?"

Judge HAMMOND: "He can show any kind of car."

A. I couldn't tell what the distance would be over a car. I got the distance from the ground to the top of the spout now and the way it was before it was changed.

31 Judge HAMMOND: "The law doesn't allow Mr. Jordan to state any changes in this construction before the accident. They have a right and it is their duty to change it and nothing is to be implied by this change."

Q. Please state, if you know, how near that spout came, before the accident, to the top of a freight car passing under it—to the best of your knowledge?

A. Well, it would come somewhere in the neighborhood of two and —half or three feet of the top of the car; there is a chain on this spout, I don't know how long it is. Think three feet—the knot that was tied in that chain would hit the roof of the car. This chain is about three feet long. There is a knot tied in it now that shortens it up and it doesn't hit now. I think the chain is about three feet long.

Q. How far over the car did the spout project?

Judge HAMMOND: "My understanding is he testifies this spout was about three feet above the roof of the car—2½ or 3 feet."

A. At the bottom it would be nearer the roof of the car than it would in the center.

Mr. WRIGHT: "Did I understand you to say that the spout was 2½ feet north of the side of the car?"

A. Above the car in that position. Say this is the roof of the car and this piece is the spout. It would be nearer here than it would at the top.

Q. You say that the end of the spout hung about 2½ or 3 feet over the car?

A. Right near the edge of the car would be closer to it than that. The spout would come near the center of the car.

Q. You observed these things before August 19, 1900, did you not?

A. Yes, sir.

Judge HAMMOND: "Does this cause depend on what you claim to be negligent construction of this spout in its inherent construction or in the use of it?"

Mr. FITZHUGH: "In its construction."

Judge HAMMOND: "This spout was made to feed the tender of the engine?"

Mr. FITZHUGH: "Yes, sir."

Judge HAMMOND: "And when the engine was standing there that

spout, when in use, for the purpose of feeding the engine with water, would be over the train, and if it was built wrong it would naturally drag people off. Does your case depend on negligent structure in that respect or that this spout was left negligently out of place?"

Mr. FITZHUGH: "My contention is in the construction of
32 it—when it was as high up as it could be—on account of the length of the chain and weights resting on the platform, when the weights rested on the platform this spout could not go up any higher, and, by reason of the length of these chains, the spout did not go up."

Judge HAMMOND: "It is not your contention that the person who used this spout immediately before negligently left it in that position?"

Mr. FITZHUGH: "We contend it would have struck him regardless of that."

Judge HAMMOND: "When they put it up, according to its structure, it was still dangerous?"

Mr. FITZHUGH: "Yes, sir. As it was usually used and as it was constructed that it was dangerous."

Judge HAMMOND: "Can you get from Mr. Jordan these measurements? That is the most important part of this case in respect to this instrument—these precise measurements."

Examination continued:

Q. Have you there the distance that I called for a few minutes ago, a perpendicular line dropped from the bottom of the spout to the rail?

A. I said a minute ago I thought it was something near 2 feet. It is one foot 9 inches. I missed it 3 inches. Here is the measurement. It is one foot nine inches.

Q. Is that from the bottom of the spout?

A. The bottom of the spout. It has a long neck that comes from the tank that is four feet or more long. This platform comes out over that spout and it is connected with this swinging spout. The bottom of this spout is one foot nine inches.

Q. State when that spout was in its usual position prior to the accident—that is, when the chains were taut and the weights resting on the platform—how the water spout hung—whether vertical or at an angle.

A. At an angle.

Q. State how it was.

A. I couldn't tell the exact angle, but it was over the car. It was not erect at all.

Q. Illustrate it as best you can—the angle.

A. It hung over the car something like that. Say this paper is the car. It hung something like that over the car.

Q. I will ask you whether a spout, hung like that (handing a photograph of the tank to the witness) illustrate by a pencil how far—just show the jury.

Mr. WRIGHT: "We object to the photograph of other tanks, unless it is shown these are not proper tanks."

33 Judge HAMMOND: "I think Mr. Wright's objection is good. This witness must describe in his own way and make his own illustrations, and you cannot aid that impression of his by comparison with similar constructions. For a long time it was doubted whether a photograph of the thing itself could be used. There may be some occasions where expert witnesses can show it. When you come to prove what is a standard tank you can show them a photograph of a standard tank, but you can't ask this witness to give his testimony to the jury by comparison of angles. He must describe it as best he can."

To the ruling of the court plaintiff duly excepted.

Q. Mr. Jordan, state as best you can then to the jury how this water spout hung when the weights attached to the chain on which the spout rested were on the platform—whether the spout was perpendicular or at an angle, and, if so, give to the best of your knowledge the angle.

A. It was at an angle. This picture is the car and the spout was about in that position.

Q. It hung at that kind of angle?

A. Yes, sir.

Q. Was the spout hanging at that kind of an angle when the weights were resting on the floor of the platform?

A. Yes, sir.

Judge HAMMOND: "How long was that supply pipe that came out from the tank and rested on the platform?"

A. "It is somewhere between four and five feet. We did not measure that supply pipe."

Judge HAMMOND: "You estimate it about four or five feet?"

A. "Somewhere between four and five feet from the tank out."

Judge HAMMOND: "What I was trying to get at was how long this supply pipe is."

A. "Between four and five."

Cross-examination by Mr. WRIGHT:

Q. As I understand—to illustrate—here is, say, the track along here of the Choctaw road, running as it did on that occasion east and west. Here's Memphis and here's Little Rock. Here is the tank, the tub where the water is put in. Formerly there was a house built around there?

A. Yes, sir.

Q. Now, where the house was built around it—say there was the house—here was the supply pipe, wasn't it?

A. It come right out at the bottom here.

34 Q. There was the supply pipe. Now, they took away the structure and left in here a platform?

A. Yes, sir.

Q. Left a platform right there?

A. Extended it out a little further to the track.

Q. Do you know that they extended it after they took the house away?

A. Yes, sir, extended it all around—made it wider.

Q. You don't know how much wider?

A. I couldn't say, but I think two feet wider.

Q. Did you ever measure it?

A. No, sir.

Q. That is your casual observation?

A. Yes, sir.

Judge HAMMOND: "Two feet nearer the track?"

Q. This tank hangs diagonally?

A. Level from the bottom of the tank out this way and this is the supply pipe.

Q. I am talking about this pipe here—the stationary pipe at the foot of the platform?

A. Yes, sir.

Q. The platform is raised from the ground quite a distance?

A. About twelve feet.

Q. The pipe then projects toward the track that you described in a diagonal position across from the supply pipe at the foot of the platform?

A. There is a pipe attached to this tank that is stationary.

Q. That comes from under the platform?

A. Yes.

Q. And this pipe comes out that way—isn't that the picture of it?

A. Yes, that is the picture of it. I don't see the tank. This is the pipe. This pipe comes out here.

Q. Presuming that that is the platform, this other pipe comes right in that situation, does it?

A. If you put a pipe on there it is. Yes, when it is attached to this bottom pipe.

Q. It comes out from under the platform, doesn't it? The supply pipe comes out underneath?

A. Yes, sir.

Q. Then to that is attached this movable pipe?

A. Yes, sir.

Q. And this movable pipe is pulled down when they want to put water in the engine?

A. Yes, sir.

Q. Did you measure from the bottom of this movable spout—the distance to the track?

35 A. It is one foot, 9 inches.

Q. You are certain of that?

A. Yes, sir.

Q. The outside of that?

A. Yes, sir.

Q. And you measured from a line dropped from the bottom of the movable spout to the track—the nearest track—and it was one foot nine inches?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. It couldn't be anything like 5 feet 6 inches?

A. No.

Q. Do you know how far over the track a car extends?

A. I don't know that I could say just how far it would extend over the rail.

Q. You never made any measurement, did you?

A. We made it, but I don't remember just what is was now. It was a small car.

Q. The car extends two feet over, doesn't it, two feet and a half, is that a fact?

A. I couldn't say just how far it extended over.

Q. An engine cab in passing there extends farther than an ordinary car, doesn't it?

A. Yes, sir.

Q. If an ordinary car extended anything like two feet the engine cab would extend very nearly three?

A. I don't suppose there would be that much difference.

Q. How much would you say the engine cab extended over the track?

A. I couldn't say.

Q. Could you give an idea?

A. I don't know how far the car would extend, and the cab would be a little wider.

Q. You have given your idea about how many feet these things were that you didn't measure, couldn't you give an idea about the car?

A. I could guess at it.

Q. You didn't hesitate to guess at it for the plaintiff, did you, when he asked you for the distances? Why is it you don't want to guess at it now? You guess at the width of this platform. You say you never measured it. The movable spout was, of course, the only thing that could hit any one on the car—that is a fact?

A. Yes, sir.

Q. The supply pipe that came out from the tank came out in a direct parallel with the track?

36 A. Yes, sir.

Q. It came out in a horizontal with the track and across the track came out at right angles to the track?

A. Yes, sir.

Q. Now, one end of this supply pipe that came out there at right angles to the track was attached to a movable valve?

A. Yes, sir.

Q. Now the end of the supply pipe and the supply pipe itself has never been changed at all?

A. No, sir. the supply pipe hasn't been changed, not the bottom.

Q. Now, the lower end of this movable pipe has always been attached to the supply pipe, hasn't it?

A. Yes, sir.

Q. So it had no effect to change the platform?
A. It would not move it at all.
Q. And it would not make the movable pipe, the only thing that would hit any one, come out any farther?
A. Not the bottom of it.
Q. The top of it either.
A. Whenever they lowered the pulleys it lets it come down nearer to the car.
Q. But the platform part didn't effect it?
A. No.
Q. Because the platform was just over the supply pipe, and if the movable pipe worked on the end of the supply pipe, it made no difference whether the platform was one foot wider or took up more space?
A. No, it would make no difference, but when they changed this it lowered these pulleys.
Q. Why did you volunteer that? Did I ask you that question?
A. No.
Q. Are you interested in the case for the plaintiff?
A. Not at all, sir.
Q. Are you paying your own expenses here?
A. Yes, sir.
Q. Do you expect to be remunerated in any way? Don't you expect your expenses paid back?
A. I had a letter that this man said he would bear my expenses over here.
Q. Your expenses are being paid?
A. Yes, sir.
Q. You expect to be remunerated?
A. Yes, sir.

Mr. WATSON: "It should be reimbursed."
Judge HAMMOND: "Every witness has a right to demand his expenses before he comes, and he need not come unless they do."

37 Mr. WRIGHT: "But I have a right to ask him, and the jury to determine whether he answers fairly or not."

Q. Before this accident occurred you never had noticed that tank with reference to any measurements at all, had you?
A. No, sir, never measured it at all.
Q. And it was a matter of casual observation with you. You didn't know how near it was to the track? In fact, never thought of it one way or the other?
A. No, I never measured it, or had any occasion——
Q. Any occasion to pay any attention to it. Now, I will ask you this: Did you measure from the lower part of the movable spout out to the car on the track or out to the track?
A. Out to the track.
Q. That was one foot 9 inches?
A. One foot nine inches.

Q. Now, what did you state (I didn't exactly catch) that was 2½ or 3 feet from the track—what part of the spout?

A. I said I guess it would be 2½ or 3 feet from the top of the car.

Q. You mean from the edge of the a car?

A. Yes, the top of a car passing under.

Q. If the spout was only 1 foot 9 inches from the track and the car extended over on the track, how could it be 2½ feet?

A. This spout, when you lower it down, would come near the car.

Q. The lawyer for the plaintiff wants to ask you whether or not this is a correct representation——

Judge HAMMOND: "Mr. Wright may ask this witness if that is a correct representation of that tank."

Q. Is this correct?

A. Well, it is correct now.

Q. Didn't you state it was correct?

A. It has been changed since the man has been killed.

Q. Is it not correct before that time?

A. Not before the killing.

Judge HAMMOND: "My recollection is when Mr. Jordan first saw the picture he called attention to the same fact that it was a picture of it as it now is."

Mr. WRIGHT. "Then I misunderstood him, and I will now withdraw it."

Judge HAMMOND: "When you show him a picture he may say it is not a picture as it was the time of the accident."

Mr. FITZHUGH: "Has he a right to show the picture to the
38 witness, pass it over to the witness for examination, hoping to elicit a certain answer, and the witness doesn't give the answer favorable to him, hasn't the jury a right to it?"

Judge HAMMOND: "No."

Q. Mr. Jordan, if the valve—the lower part of the valve—is one foot 9 inches from the track, can't you give any idea at all of how far the cars extend over the track? Give some faint idea to the jury.

A. I guess that would be—about a foot and a half—about a foot I guess.

Q. Now, then, if it were a foot and a half as you first stated, the car would be within three inches of the valve—the outside of the car as it went along?

A. I told you that I didn't think it would be more than a foot.

Q. If it were a foot, the edge of the car would be within 9 inches of the lower part of the valve, that is a fact, isn't it?

A. I couldn't say, sir.

Q. Since you think about it, it may be you would say it was less than a foot?

A. I couldn't say what it was. About a foot.

Q. Then the edge of an ordinary car, as you have stated, in passing, would be, according to your measurements, within a foot of the lower part of the valve—that is a fact, isn't it?

A. If it were about a foot, the car would project about a foot over the rail and it would be about 9 inches.

Q. You say that you have seen them pass there, haven't you?

A. Yes, sir.

Q. How far have you seen the ordinary box car pass and how far did it miss the foot of that spout—the mouth of the supply pipe?

A. The car only projected a foot, and it is a foot and 9 inches, and it would only miss 9 inches.

Q. Did it miss 9 inches?

A. I couldn't say that exactly.

Q. About how far?

A. About 9 inches.

Q. You say an ordinary flat car passing this spout would miss it nine inches? You have seen engines passing there to-, haven't you?

A. Yes, sir.

Q. An engine cab is wider than an ordinary car?

A. Yes, sir.

Q. How far would the engine cab miss the foot of that spout?

A. It would not miss it a great deal.

39 Q. About two or three inches, if your measurements are correct?

A. I suppose it would. Somewhere about it.

Q. You say the foot of the spout which is here—the foot is farther away from the car moving down the track than any other part? The foot of the spout is farther away from the car than any part on here—it is bound to be—isn't that so—farther north of the car?

A. I guess something about it.

Q. You mean about as far or farther away?

A. I can't say how it would be. I think when the spout is hanging in that condition it would be nearer to the car here.

Q. The foot of the spout would be farther away than any other portion, isn't that a thing you can see? The foot of the spout would be farther away from the rail of the track than any other portion—if you drop a line from the foot of the spout to a point—the point where that line would strike would be farther north from the track than any other part of the spout, if the spout extends towards the track, isn't that bound to be so?

A. I guess it would. This pipe extending out over there.

Q. If the pipe extends over the track, the foot is bound to be farthest away from the track?

A. I guess so.

Q. You say the foot of the spout—the bottom of the spout—where it joins to the supply pipe—is about twelve feet high?

A. Yes, sir.

Q. About how long was that spout—the moveable spout—the spray spout?

A. About nine feet long.

Q. Now, how tall is the average box car?

A. I couldn't say.

Q. Can't you give any idea?

A. I don't know, 8 or 9 feet, I reckon. I couldn't say.

Q. Couldn't give any idea?
A. Somewhere about there.
Q. You never made any calculation?
A. Somewhere about 8 or 9 feet—maybe 10.
Q. How tall is the top of an engine cab?
A. I couldn't say. I never measured it.
Q. You couldn't give any idea of that either?
A. It is a little taller than a box car. If box cars are 8, 9 or 10 feet—I couldn't say how tall either one of them are.
40 Q. I will ask this question: Do you know how wide the track is there? You made some measurements about that, didn't you?
A. I didn't measure the width of the track. I think the standard gauge is four feet 8 inches.
Q. As a matter of fact, when the spout comes down from this supply pipe—spray spout—this moveable spout is 9 feet long you measured that?
A. Yes, sir.
Q. When it comes down to the moveable spout, it strikes the hole in the engine to feed the water in?
A. Yes.
Q. The hole of the engine is about the center of the engine?
A. Yes, sir.
Q. If the spout is 9 feet long, and if the end of the spout which is farthest away from the track and which joins onto the supply spout is only one foot 9 inches from the edge of the rail—can you account for why the foot of the spout is only one foot 9 inches.
A. I can explain that very easily. These engines they use on the Choctaw now is taller—that spout won't pull in the hole.
Q. I am not speaking of engines they have now. I am talking about at that time.
A. They have the same engine now that they had when this man was killed.
Q. You mean they won't come over square?
A. They won't go square. At that time they wouldn't do it. Not with the big engines on the Choctaw. The old Little Rock engines would go in.
Q. When did they change the old Little Rock engines?
A. I couldn't give the date when they were changed.
Q. On the old Little Rock engines they would go in square?
A. Yes, sir.
Q. They haven't changed the guage of the track, have they?
A. No. These engines are lower and it took the pipe further to go down.
Q. On the old Little Rock engines they would go right straight across?
A. Yes.
Q. Wasn't the gauge of the road the same?
A. Yes.
Q. Wasn't the hole in the engine even with the middle of the track on the Little Rock engines?
A. Yes, it was lower down on that.

41 Re-examination:

Q. In regard to these measurements, are you testifying from your recollection or from an inspection of the memorandum made at the time you took the measurements?

A. From the memorandum. I helped to make that.

Q. Outside of the memorandum, have you any recollection at all about these measurements?

A. Well, the spout is 20 feet 8 inches now, and before it was 9 feet and 7 inches, I believe.

Mr. WRIGHT: "We object to his stating about 'now.'"

Q. You say you are testifying from a memorandum made at the time, haven't you made a mistake in regard to the distance you gave of a foot and 9 inches from a perpendicular line dropped from the farthest end of the spout or from the lower end of the spout?

Mr. WRIGHT: "I object to that. He has been examined and re-examined and he said from the spout, nearest the ground, 12 feet, and that from the supply pipe he dropped a perpendicular line and it was one foot nine inches."

Judge HAMMOND: "Mr. Fitzhugh can re-examine him and have him correct it, if he can."

Q. Mr. Jordan, that memorandum that you have was made at the time the measurements were taken?

A. Yes, sir.

Q. Please examine that and state what the measurement was from a perpendicular line dropped from the end of the spout nearest to the track to the first rail, and what the distance was from the farthest end of the spout—the moveable spout—when it is in position.

Judge HAMMOND: "You mean when the spout is elevated."

Q. When the spout is elevated, with the chains taut, and the weights on the platform, state what distance, from a perpendicular line dropped to the ground from the top of the water-spout to the first rail."

Mr. WRIGHT: "I first call for the witness to reply whether or not he can testify without that memorandum."

Mr. FITZHUGH: "He said he could not."

Mr. WRIGHT: "I will ask if he can refresh his memory and then testify independently of the memorandum?"

A. This statement is the way we measured it and it is 20 feet and 8 inches from the top of the spout to the ground and this says from the center of the rail it is one foot nine inches—center of the nearest rail.

42 Q. You say that the distance from the top of the water-spout, when in position, in a stationary position, when the weights are in the platform, is 20 feet—that is, it was, on September 25, 1900, 20 feet and 8 inches?

A. Yes, sir.

Q. What is the distance of a line dropped perpendicularly from the top of this water-spout in that position to the nearest rail?

A. The top of the water-spout?

Q. Dropping a perpendicular line—how far from the bottom of that perpendicular line to the nearest rail?

A. I couldn't say. It just says from the center of the rail it is one foot nine inches.

Q. One foot nine inches to what?

A. This perpendicular line to the top of spout to ground to center of rail one foot nine inches.

Q. What is the distance from the lower end of the water-spout to the ground—what is the distance?

A. I have stated that. I told you awhile ago it was 12 feet from there to the ground.

Q. Dropping a perpendicular line, Mr. Jordan, from the lower end of the water-spout, where it connects with the supply line—what is the distance from that line to the rail?

A. I don't think we got that.

Q. Look and see if you haven't. From the perpendicular line dropped from the lower end of the water-spout to the center of the rail of the nearest track?

A. Four feet and three inches this says.

Q. That is the distance from the lower end of the water-spout or where it connects with the supply pipe to the rail—the nearest rail—is it not? Dropping a perpendicular line to the lower end of the water-spout and measuring from that line to the rail 4 feet and 3 inches?

A. Yes, sir.

Q. When you spoke of one foot, nine inches——

A. That is from the end of the supply pipe to the rail—this pipe that comes out from the tank—that comes out here from the end of this pipe to the rail would be one foot nine inches.

Mr. WRIGHT: "You say from the end of the supply pipe that comes out here—the nearest end to the rail—is one foot 9 inches?"

A. "Yes, sir."

Q. What did you say was the distance from the farthest end of the perpendicular line?

A. It would be four feet three inches.

Q. Is that memorandum correct?

A. I think it is.

Q. Can you refresh your memory by looking at that memorandum and state what these distances are?

43 A. I can read it to you. I reckon I can.

Q. Do you know they are correct?

A. Yes, sir. We taken the measures and it is correct, I think. I am sure they are.

Q. Then, state what they are.

A. Well, the spout is nine feet long. From perpendicular line from spout to center of rail four feet three inches.

Q. Now, state what is the distance from perpendicular line dropped from the top of the spout, not the lower end, where it connects—a line dropped perpendicularly from the end of the spout when in

position—a line dropped from the end of that spout to the ground—from that line to the center of the rail what is the distance?

A. I couldn't say.

Mr. WRIGHT: "Whose handwriting is that in?"

A. "That man wrote it, I think. He put it down as we taken it."

Recross:

Q. When was that?

A. On the 25th of September.

Q. At Goodwin?

A. Yes, sir.

Judge HAMMOND: "It is a memorandum of the distances you took when you measured it?"

A. "Yes, sir."

Q. Did you ever compare it or look over it?

A. We took the measures and he set it down.

Q. Did you examine it then?

A. I just saw him put it down.

Q. You didn't examine it, did you?

A. I looked over it.

Q. Did you examine it?

A. I just saw him put it down.

Q. Just like you see the stenographer writing here?

A. That is the measurements to the best of my knowledge we taken.

Q. You didn't compare it, did you, and see that it was correct?

A. No.

Q. You simply called off and Mr. Fitzhugh put something down?

A. Yes.

Q. You have never seen it since then?

A. No, it has been left there at Dyer & Company's store?

Q. You have never looked at it?

44 A. I looked at it a few days ago.

Q. You didn't look at it at the time?

A. I saw him putting it down.

Q. Did you read it after he put it down?

A. No, I just read as he put it down.

Q. You don't know that he put down what you called off? You just supposed that.

A. That is a correct statement, I think, sir.

Q. Did you verify it in any way?

A. No.

Q. You didn't see it again?

A. I saw it a week ago.

Q. A week ago you saw it for the first time?

A. Yes, sir.

Re-examination:

Q. Weren't these measurements taken in your presence and put down, and, immediately after they were put down, weren't they read over to you and Mr. G. P. Walker both?

A. Yes, sir.

Q. Didn't you know at the time they were put down and read over that they were read correctly?

A. It was read correct and put down correct, yes, sir.

And further saith not.

The deposition of C. A. Hollowell and W. D. Kennedy, taken by counsel at the office of Watson & Fitzhugh on behalf of the plaintiff in the above-styled cause this December 15th, 1900.

All formality as to notice, etc., expressly waived, exceptions for incompetency and irrelevancy alone being reserved, all of which exceptions, it is agreed by counsel, may be heard at the hearing.

Mr. C. A. HOLLWELL, being duly sworn, testified as follows:

Direct examination by Mr. FITZHUGH:

Q. What is your name, residence and occupation, Mr. Hollwell?

A. My present residence is North Little Rock. My address is Little Rock post-office, general delivery. Conductor is my occupation—railroad conductor.

Q. How long have you been a conductor?

45 A. Well, about four years.

Q. What railroad company have you been connected with during that time?

A. The Union Pacific, Colorado & Southern, Atchinson, Topeka & Santa Fe and the Choctaw, Oklahoma & Gulf railway.

Q. What company are you now connected with?

A. Choctaw, Oklahoma & Gulf.

Q. What company were you connected with in August, 1900?

A. Choctaw, Oklahoma & Gulf, or the Choctaw & Memphis. I don't know if they changed that before August or since.

Q. Mr. Hollwell, do you recollect when Mr. John I. McDade was killed?

A. Yes, sir.

Q. Did you know Mr. John I. McDade personally?

A. Nothing only as an employé of the company.

Q. Did you know him personally?

A. No.

Q. Did you know him when you saw him?

A. I knew him when I saw him.

Q. What was his position at the time that he was killed?

A. Head brakeman.

Q. How long had he been holding that position?

A. He had been with me about, I think, six weeks. I don't know just what length of time it was.

Q. What were the duties of the head brakeman?

A. Well, they are various. In what line do you mean?

Q. Just a general scope of their duty.

A. While they are on the road the duties of a head brakeman, as well as the rear brakeman, is to look after their train and to do the train-work. That is about as near as I could answer that, I guess, unless you go into rules and details.

Q. Well, can you give a statement of what his general duties were?

A. That would be in looking after his train and watching the cars.

Q. How long had Mr. John I. McDade been in the employ of the Choctaw, Oklahoma and Gulf railway?

A. I don't know, don't remember.

Q. Did you ever hear of his being employed with the company prior to his being a member of your crew?

A. Yes, he had been on other crews on the Western division—the Booneville division.

Q. What is the Booneville division?

46 A. That consists from Little Rock to Booneville.

Q. From Little Rock west to Booneville?

A. Yes, sir, west.

Q. When he was transferred to the division between Little Rock and Memphis he became a member of your crew, did he?

A. Yes, he was transferred to my crew.

Q. Who composed your crew, Mr. Hollowell?

A. Mr. McDade and Mr. Kennedy and myself.

Q. They were the two brakemen, were they?

A. They were the brakemen.

Q. Who was your fireman?

A. I don't remember the fireman's name on this night or on this train.

Q. Who was the engineer?

A. Robert Church.

Q. Robert Church?

A. Church.

Q. Was he the engineer of the train on which McDade was a brakeman at the time he was killed?

A. Yes, sir.

Q. You are certain of that are you?

A. I think that is the proper name as near as I know. That is the way I have got it on the report there, I think. I took those names at the time.

Q. You don't remember the fireman?

A. No, I don't remember the fireman's name. I had no occasion to impress that on my memory. I took it at the time I made out my accident report and have it on my train book, of course, and haven't looked at it since.

Q. Mr. Hollwell, when was the last time you saw John I. McDade alive?

A. At Forrest City—leaving Forrest City.

Q. What time did you leave Forrest City?

A. I couldn't state the exact time. I have no record of it at all. Something a little after midnight—about 12.10.

Q. What date was that?

A. On the 20th; well, leaving there about 12.10 or 15 a. m., would make it on the day of the accident. That was the 20th of August, wasn't it?

Q. 19th, wasn't it?

A. *81*th or 19th. I guess that is right.

Q. What time did your train that night reach Goodwin, Arkansas?

A. About 1.20—between 1.00 and 1.20.

Q. Where was Mr. John I. McDade when you last saw him alive?

47 A. I gave him the night train orders to take the engineer. He was on the ground at that time and went to the engine.

Q. You saw him take the orders to the engineer, did you?

A. Yes, I handed him the orders, told him we were ready to go just as soon as Mr. Church was ready.

Q. Where were you when the freight train pulled into Goodwin, Ark., that night?

A. In the cupola of the caboose.

Q. Which direction were you looking when you were pulling into Goodwin, Arkansas?

A. Looking west—that was the direction of the train.

Q. What signals were given when the train approached Goodwin?

A. The engineer whistled for the station and the signal to go ahead was given.

Q. Who gave the signal?

A. I did.

Q. How did you give the signal?

A. With a lantern.

Q. Where *were* the brakeman at this time on that train?

A. The rear brakeman—it is customary for them to pass the signal from me to the head brakeman, and the head brakeman to pass the signal to the engineer.

Q. Did you see all this?

A. The signal of all the lamps.

Q. Where was the head brakeman?

A. I couldn't say—that is on what particular car he was on. Circumstances show that he was about eight or ten cars from the engine.

Q. What do you mean by circumstances?

A. Where his lamp was found after he was killed.

Q. Where was the lamp of the head brakeman, John I. McDade, found?

A. What we call the grab-iron on the front of the car, I think about ten cars from the engine.

Q. What did you say about the grab-iron?

A. The lamp was under the grab-iron. It is part of the ladder on top of the car. We call it the grab-iron.

Q. On what side of the car was this lantern found?
A. On the north side?
Q. Which side of the grab-iron was it found on?
A. On the inside, what we call the inside.
Q. Well, on what side is the north side of the car as the train approaches Goodwin going west?
A. The right hand.
48 Q. How far from the edge of the car was this lantern found?
A. I think that particular iron was stationed about 12 inches probably from the edge, possibly a little more than that. They vary, some are near the edge, some 18 inches away and some nearly 2 feet. Different companies place them in different positions.
Q. When and by whom was this lantern found?
A. By myself first.
Q. When did you find it?
A. Well, after we had arrived at Brinkley.
Q. How far is Brinkley west of Goodwin?
A. Nine miles, I think; about that.
Q. You say, Mr. Hollwell, as the train was pulling into Goodwin, going west on this night, about 1.20 a. m., August 19th, 1900, that you was in the cupola of the caboose looking west, and that the engineer gave the whistle and you gave the signal to go on?
A. Yes.
Q. This signal, you say, was communicated by the rear brakeman to the head brakeman and by him to the engineer?
A. Yes, sir.
Q. And you personally saw these signals given?
A. Yes, sir.
Q. And the head brakeman, as, you state, was John I. McDade?
A. Yes, sir.
Q. Where was he standing to the best of your knowledge at the time he was giving this signal as the train was pulling into Goodwin?
A. From the position of his lamp and the signal, I should judge he was probably sitting on the edge of the car.
Q. He was sitting at the time you gave the signal?
A. I should judge this was his position at this time.
Q. You saw the signal given and you could tell whether he was sitting down or standing up?
A. Yes. Sitting down or standing on the ladder at the side.
Q. Didn't you say he was sitting down?
A. I said he must have been.
Q. Which side of the car was he sitting?
A. On the right-hand side.
Q. How far was the train from the water tank at Goodwin when this signal was being given by Mr. McDade to go ahead?
A. Between a fourth and a half mile.
49 Q. Did the train stop that night at Goodwin?
A. No, sir.
Q. How many cars were in this freight train that night?

A. I don't remember the exact number. My book will show it, but I haven't got the book here.

Q. Was it a long or short train?

A. An ordinary train, I should judge we had between 25 and 30 cars, something like that.

Q. How many furniture cars in this train?

A. About three or four.

Q. What is the difference in size—that is the width and height of a furniture car as compared with the average freight car?

A. About two feet—18 inches to two feet.

Q. 18 inches to 2 feet higher than an ordinary freight car?

A. Yes.

Q. How much broader is the furniture car than the ordinary freight car?

A. Well, not any.

Q. Not any broader?

A. As a general rule. Some vary and probably will be 4 to 6 inches wider.

Q. Did you examine this furniture car on which you found Mr. John I. McDade's lantern that night?

A. Yes, sir.

Q. What was the number of this car and to what road did it belong?

A. It was an I. C. car; I can't give the exact number without reference to the book.

Q. Didn't you give it a report you made?

A. Yes, sir; from the book.

Q. You have that report here, have you not? Will you kindly look at that report and give it?

A. I neglected to bring my book.

Q. You can give it by looking at the report, can't you?

A. Yes, the report shows. When we make out these reports we copy everything, the number of cars in the train and everything else. The number is 28149 I. C.

Q. Did you make any measurements of this car?

A. No, sir.

Q. But you know from your experience as a railroad man and your observation of this car that this furniture car on which his lantern was found was 18 inches to 2 feet higher than an ordinary freight car?

A. Yes, sir.

Q. How fast was this train running that night? As it was pulling into Goodwin?

50 A. About 20 miles an hour; 18 to 20 miles an hour.

Q. State whether it was going up or down grade?

A. Level.

Q. Do you know, Mr. Hollwell, whether you were the first person who saw this lantern on the furniture car after Mr. McDade was killed?

A. I was the first one on top of the car after we discovered he was missing.

Q. When did you discover that Mr. McDade was missing from your train that night?

A. On arrival at Brinkley.

Q. Who made the discovery?

A. Well, the head brakeman, I should judge.

Q. I thought McDade was the head brakeman?

A. The rear brakeman I should say.

Q. Who was the rear brakeman?

A. Kennedy.

Q. Did he report it to you?

A. In a way. I asked him; when we arrived there we had some work to do, and I says: "Where's Mack?" He says: "I don't know, I haven't seen him since we got here at all." I says, "That's funny, didn't you see him when we stopped at the tank below town?" He says, "No, I didn't see him there. I was checking up cars and didn't see him at all."

Q. You referred to stopping at the tank below town. Do you mean the tank below Brinkley?

A. At the station. It is a little below the depot.

Q. Had Mr. Kennedy spoken to you or any one on the train, so far as you know, about Mr. McDade being missing before this time?

A. No, that is the first we knew of it.

Q. He was on top of the train all the time, wasn't he?

A. Who?

Q. Kennedy?

A. No, he was on the ground when we were talking.

Q. From the time your train left Goodwin until it reached Brinkley, what was his position?

A. In the caboose except going through Weakley Station.

Q. When you passed Weakley Station what signals were given?

A. Go ahead.

Q. To whom did you give it?

A. It was answered by the engineer.

Q. Did you give any signals at all from the time you left Goodwin until the train reached Brinkley?

51 A. Only to go ahead through Wheatley.

Q. When the engine whistled at Brinkley what signals were given?

A. None.

Q. You say Mr. Kennedy replied, when you asked him where McDade was at Brinkley——

A. That he didn't know, that he hadn't seen him since we got there.

Q. Did he say when he last seen him?

A. At Forrest City.

Q. Mr. Kennedy told you at Brinkley that night that he had last seen McDade at Forrest City?

A. No. I had last seen him. Mr. Kennedy didn't see him at Forrest City at all. Mr. Kennedy was in the rear of the train at Forrest City, and Mr. McDade and I did the work.

Q. When did Mr. Kennedy tell you that night that he had last seen Mr. J. I. McDade?

A. He didn't tell me — had last seen him at all. Any more than the signals he had seen passed at Goodwin.

Q. That was all he had seen?

A. He made the remark, I think, said, "I haven't seen any signal since we left Goodwin."

Q. He hadn't seen anything of him, so he told you, except the signal given when you passed through Goodwin?

A. Yes.

Q. You stated that you inquired at Brinkley for him—where Mack was. Do you mean by that Mr. John I. McDade?

A. McDade.

Q. Did you call him familiarly by that name--Mack?

A. Mack.

Q. Yet, you didn't know him personally at all?

A. Well, I knew him as a brother employee.

Q. I understood you to say in the opening part of your examination you did not know him personally at all.

A. Up to the time he was on my crew. I wasn't acquainted with him until he was transferred to my crew—personally. You asked if I knew him before he was transferred.

Q. Then you did know him personally from the time he was transferred to your crew?

A. Yes.

Q. Mr. Hollwell, did you testify at the coroner's inquest held over the body of Mr. John I. McDade at Forrest City, Arkansas?

A. We were there on the inquest, but the body wasn't there at the time.

52 Q. When did you go to Forrest City, Ark., for this purpose?

A. On train No. 4, it was at that time.

Q. Was that a passenger train?

A. Yes; a passenger train.

Q. What time did it reach Forrest City?

A. About 5.20.

Q. Did you go on the same train on which the remains of McDade were carried?

A. They forwarded them from Forrest City to Memphis on that train. Placed them on the train when we came in there.

Q. Did you see the body of Mr. McDade at all?

A. No, sir.

Q. When was his body first discovered and by whom, if you know?

A. It was discovered on train No. 2 by the engineer of the train No. 2. They were on time that night, due at Goodwin something like 3 o'clock. I don't know the exact time they were due at that time. The time has been changed since. I don't remember the time they were due there.

Q. Mr. Hollwell, there is a water tank situated there at Goodwin, is there not?

A. Yes, sir.

Q. Where is it located?

A. On the north side of the track.

Q. At the time this train passed Goodwin, Arkansas, at 1.20 a. m., August 19th, 1900, state whether or not that water tank and its appurtenances were as they now are?

A. Well, everything is apparently the same, as far as I know.

Q. You don't know of any change whatever?

A. Haven't noticed any.

Q. State how the water-spout connected with this tank stood with reference to the tank—that is, whether it was perpendicular or whether it hung at an angle with the side of the tank?

A. Well, it hung with an angle, a slight angle.

Q. Do you know the extent of this angle?

A. No.

Q. How long had the tank been in the condition that it was in the night that this train passed by it?

A. As far as I know ever since I have passed there.

Q. State whether or not you had ever made any observation in regard to it personally?

A. Nothing only to be careful to be out of the way of it.

53 Q. You had to be careful to keep out of the way of it, did you?

A. Yes, sir.

Q. How near did the water-spout hang at the time of the death of Mr. McDade to the ordinary freight car as the train passed under it?

A. I couldn't give you any figures on it at all. I never measured it.

Q. But, as you stated, it was near enough to require one to be very careful in order to avoid being struck by it?

A. Well, it required the same as all other side obstructions on the road—on any road as far as that is concerned—always be careful when you pass there.

Q. You did state, did you not, that one had to be very careful in order to avoid being struck by it?

A. Yes, be careful in order to pass by it.

Q. Mr. Hollwell, state what experiences you have had on other railroads as to whether you have been a brakeman on other roads or not?

A. Yes, sir.

Q. Were you ever brakeman on the Choctaw, Oklahoma & Gulf road?

A. No, sir.

Q. Do you know how far the ordinary freight car projects beyond the rail?

A. Well, no, I can't give you the exact figures on it, without measuring it.

Q. Do you know the width of an ordinary freight car?

A. Eight feet, I think, is the standard.

Q. What is the width of the usual or ordinary furniture car?

A. From 8–4 to 8–8.

Q. Mr. Hollwell, do you know the height of this water-spout from

the ground? That is, the height of it from the top and from the point where it connects with the pipe which leads into the tank?

A. No.

Q. State whether or not you have ever made any measurements?

A. Never made any measurements at all of anything of that kind, only by sight, looking at it.

Q. What is the height of the ordinary furniture car?

A. Well, from about 13½ to 14½ feet. That is, from rail measurement—bottom measurement—I guess that is it.

Q. By bottom you mean the floor of the car?

A. Yes; of course that varies. The center of the car is higher than the edges.

54 Q. About the average height of furniture cars, from floor to top, is 13½ to 14?

A. Yes.

Q. What is the height of the ordinary standard freight car from top to floor?

A. It runs from about 10½ to 12—11 feet, is the standard, I guess.

Q. What is the distance from the top of the rail to the floor of a standard car?

A. Standard car, I guess, would be about 3 feet.

Q. What is the distance from the top of the rail to the floor of the furniture car?

A. About the same. Of course some cars are built different from others.

Q. State whether or not you knew Mr. John I. McDade well; whether you ever had any talk with him?

A. I was personally acquainted with him as one of my crew.

Q. When was the last time you had any conversation with him at all?

A. At Forrest City.

Q. That was when you gave him the orders?

A. Yes, sir.

Q. State whether you said anything else to him that night except to give the order.

A. To tell the engineer to go to Brinkley ahead of No. 3, if possible.

Q. Please state what the duties of Mr. McDade as head brakeman where they required him to be when the train was in motion?

A. Well, it would require him to use his own pleasure about that. The rules are to be on top of the train passing through all stations and meeting points. He could ride in the engine if it so pleased him. At other times he could ride on top.

Q. State what is the usual custom of the head brakeman, on your road and others, in regard to their positions on the top of the car when passing stations?

A. Well, there is no specified position at all. They use their own pleasure in regard to that.

Q. What custom, if any, exists in regard to their sitting on the side of the car.

A. That is the customary position always of a person riding on top.

Q. Then, at the time this train pulled into Goodwin, Arkansas, on the night of August 19th, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin and in the discharge of his duties, was he not?

55 A. Well, I will answer that he was in the discharge of his duties.

Q. He was, at the last time you saw him, in the proper discharge of his duties?

A. Yes, on top of the train looking after the train.

Q. Near which end of the furniture was this grab-iron to which you have referred?

A. The west end.

Q. How far from the west end was this grab-iron and near which end of the grab-iron was the lantern?

A. The iron was situated right at the end of the car, that is within five or six inches of the end. The lantern was in the center of the iron—the iron is about 18 inches long.

Q. And a few inches back from it, you said?

A. Yes, I think about 12 inches.

Q. How was the track? What was the condition of the track along Goodwin, at that time?

A. Well, in fair condition. That is a condition to insure safety at a speed of 20 or 25 miles an hour—freight train.

Q. The surface of the ground—what was the condition of the surface of the ground along there?

A. It was smooth—level.

Q. How was the track? Was it level or on a grade?

A. Level.

Q. No embankment or anything of that kind?

A. No, the side tracks are east of the tank and south of the tank and it enters on the north side.

Q. When a freight train is pulling into a station or passing a station, Mr. Hollwell, what position is customary for the brakeman to occupy if sitting on the car with reference to the ladder of the car?

A. Well, they would sit near so as to be ready to catch hold of the grab-iron.

Q. And that is, as you say, the usual and customary position for them?

A. Yes; of course those irons are put there for safety—for protection—to hold to.

Q. What, if anything, else did you discover on top of this furniture car where you found Mr. McDade's lantern?

A. Nothing at all.

Q. After the conversation with Mr. Kennedy, what did you do?

A. Asked the engineer if he had seen anything of McDade.

Q. What did he say?

56 A. Said he hadn't seen him or hadn't seen any movement of his lamp after he left Goodwin.

Q. These signals which were given as the train was going into Goodwin, how long did they continue from the time you first saw them?

A. Probably ten seconds.

Q. How far did the train go during that time?

A. That would be pretty hard to determine.

Q. Approximately.

A. It would not go over 50 feet, I suppose, or a hundred. Say 100 feet. It is merely a movement of the hand just two or three times. Probably 100 feet.

Q. State the position of this furniture car on which you found McDade's lantern at Brinkley, with reference to whether it was nearest the engine or caboose?

A. It was nearest the engine.

Q. How far was it from the caboose?

A. I couldn't give you the exact distance or number of cars between it.

Q. Will your report show the number of cars?

A. It shows in the report, I think. I don't know. I have twenty-five cars in the train. That would make him about 13 or 14 cars from the caboose.

Q. You have referred to a report made by you to the company in regard to this accident. When was this report made?

A. Immediately after the accident. The same day.

Q. Do you object to letting the stenographer copy that report?

A. No, sir. The report was made to the trainmaster and the superintendent.

Q. Then, you do consent to her making copy of that report?

A. Yes.

Q. What is the ordinary speed of a freight train on your road?

A. -0 to 25 miles an hour. That is in different parts of it. Some parts of the new construction—that is limited to 10 or 12.

Q. What was the ordinary speed on this part of the road?

A. Between Forrest City and Brinkley 25 miles an hour is the limit.

Q. And you were running about the limit that night—August 19th?

A. A little less than the limit—20 miles an hour.

Q. You had given orders at Forrest City to the engineer to try to get to a certain point before another train reached there, had you not?

57 A. Yes, giving him at a speed of about 20 miles an hour.

Q. In order to make that point, state whether or not it was necessary to increase the speed above the ordinary?

A. No, it would not be necessary.

Q. Why did you give the order to make this point?

A. In case anything happened. If we had to stop for any cause known to us at that time. You might say my remark was for him not to stop unless he had to. If he had plenty of water and it wasn't necessary for him to take water at Goodwin, to keep on.

Q. How long did you state you had been working on the division between Little Rock and Memphis?

A. I have been between Little Rock and Memphis since about the 24th of May, 1900.

Q. When did you first have your attention called to the proximity of this water-spout to the track and trains passing along there at Goodwin, Arkansas?

A. Well, I don't know that it was ever called to that one more than any other.

Q. State whether or not, prior to this time, you had noticed the proximity to it and had been impressed with the idea that it was necessary to be careful about it?

A. The first trip probably I made over the road, if it was daytime when I passed there, I would notice it, if I happened to be looking or watching for anything of that kind. I couldn't give any date as to when I noticed it first or anything of the kind.

Q. State whether or not you had noticed it?

A. I had noticed the distance the same as we notice the distance of everything that is projecting towards the train.

Q. How many water tanks are there between Memphis and Little Rock?

A. Bymeter is one, Carlisle is the second, the third one is White River, the fourth is Brinkley and Goodwin, Madison, and there is another one—Edmondson.

Q. You have given all there are between Memphis and Little Rock?

A. Yes.

Q. State whether or not they are all alike?

A. They are all about uniform tanks. At Edmondson there are two—a large and a small one, side by side.

Q. What do you mean by uniform tanks?

A. Size, height and width.

Q. State whether or not you have ever taken any measurements of the different tanks and the distance which the tanks and water-spouts are from the track?

58 A. No, sir; I have never measured any of them.

Q. What was Mr. McDade's condition at Forrest City as to health, mentally and physically?

A. Ordinary, I guess, as far as I know. I didn't hear any complaints from him at all.

Q. He seemed to be in sound health physically and mentally?

—. ——.

Q. State what his character as a man and his reputation as a brakeman?

A. His character was first-class, he was a first-class railroad man in all respects.

Q. What was his age?

A. I don't know.

Q. How did you regard him, Mr. Hollwell, as an employee under you?

A. As a first-class man.

Q. State what his character was with reference to his efficiency or inefficiency, carelessness or prudence?

A. He was always very careful in handling trains, doing work and everything of that kind.

Q. State whether during your observation of him and while he was under you and a member of your crew you had ever noticed anything to the contrary?

A. No.

Q. What was the condition of the weather that night—August 19th, 1900?

A. It was clear.

Q. Moon shining or not?

A. The moon hadn't been up very long and was giving a very pale light—misty you might call it.

Q. What is the custom of brakemen with reference to keeping their lanterns with them when they are on a moving train?

A. They always keep their lanterns in reaching distance, they never move without it.

Q. In approaching a station what is the duty of the brakeman with reference to looking out for signals and keeping his mind on that subject?

A. That is his duty—to look, and, after he receives one signal, to watch and see that no further is given until he is satisfied everything is alright.

Q. Satisfy himself that the signal has been observed?

A. And that that is all he is going to get and there is no more, and then it is the duty of employees on the head end of a freight train to always watch the train, and at the rear end to watch for signals.

59 Q. At the time you saw Mr. John I. McDade, when he was giving the signal for the train to go on, after the engine had whistled at Goodwin, how was he facing when sitting on the side of the car?

A. Well, he would be naturally *be* facing north, facing the right-hand side. Of course I couldn't tell whether he was sitting that way or not. He might have been on the ladder or facing in an entirely different direction.

Q. To the best of your knowledge and belief, from you seeing him give the signal, you think he was facing north on this furniture car where his lantern was found at Brinkley?

A. Yes, sir.

Q. What conversation had you and other members of the crew had prior to this time about the danger of this water-spout there at Goodwin?

A. I don't know that we ever had any about this one in particular.

Q. What conversation had you had about any of them?

A. We had conversation at different times about all obstructions—called each other's attention to them.

Q. What other obstructions?

A. Bridges—wires.

Q. Where are the overhead bridges between Little Rock and Memphis?

A. White River and Madison.

Q. When did you have such conversation prior to this accident?

A. On previous trip at different times. I couldn't give any stated time.

Q. In these conversations what reference was made to this water-spout at Goodwin?

A. I don't think any. I don't remember that that was specified more than any other.

Q. Yet you have stated that you considered it so dangerous you had to be careful to look out for it?

A. The same as all of them.

Q. In what did the danger consist?

A. Being struck when passing the train moving—the spout might not be in its natural position or left hanging low.

Q. What is the natural position of these water-spouts?

A. Some of them are straight, others at an angle.

Q. State which water-spouts on the Choctaw & Memphis R. R. are straight or perpendicular with reference to the tanks.

A. I don't think any of them are perfectly straight. They all hang more or less at an angle.

Q. Didn't you state that some were straight?

A. No.

60 Q. They hang at different angles, do they?

A. It would be pretty hard to have them all to hang alike.

Q. State whether or not the intention of the company is to have them hang straight? What is customary?

A. I never see any hanging straight any place.

Q. What other water-spouts had hung at a greater angle from the tank than the one at Goodwin?

A. Well, there is one at Little Rock. That doesn't come under our jurisdiction. And the tank at Bimeter hangs at an angle and the same at Carlisles.

Q. At what angle do these hang?

A. I don't know. I couldn't give any figures on them.

Q. Do they hang at a greater or less angle than the one at Goodwin?

A. As I say they vary. Sometimes they are left in a little lower position, and at other times they go clear back as far as they can go. All firemen don't leave them the same, of course. Sometimes the motion of the wind is enough to move the water-spout back and forth.

Q. Mr. Hollwell, state whether your observation of these spouts has been greater since or before this accident.

A. No, I haven't noticed them any more since than I did before.

Q. State whether or not this accident caused you to observe them afterwards at all?

A. It would impress upon my mind—I would want to look out for them a little more for myself, of course.

Q. Now, when these water-spouts were hanging at an angle such

as the one at Goodwin on the night of August 19, how near would it come to the top of the furniture car—the edge of a furniture car—the top edge of a furniture car?

A. I should judge that it would take different measurements of it. The closest probably would be 18 inches to 2 feet, and the farthest might be 2½ feet or 3 feet.

Q. And the iron water-spout on the tank at Goodwin at this time would come probably within 18 inches or two feet of the top edge of a furniture car?

A. Yes.

Q. What is the height of a person sitting on the edge of a car, an average man?

A. An average man on a car ought to be 2½ feet.

Q. Do you know Mr. John I. McDade's height? Did you know it?

A. Not the exact height. I should judge he was about six feet tall.

61 Q. A fine specimen of physical manhood, was he not?

A. He was tall and straight.

Q. What position does Mr. A. H. Killpatrick hold with the Choctaw, Oklahoma and Gulf R. R.?

A. General claim agent.

Q. He is present now while you are giving this deposition?

A. Yes, sir.

Q. You stated that the angle of these water-spouts with reference to the tank would vary on account of being left in an unnatural position sometimes by the fireman and sometimes the wind would blow them?

A. Yes.

Q. How are they suspended so they can be affected by the movement of the wind?

A. They are suspended by two chains with iron weights attached, and if one chain happens to become caught some way in the pulleys, the other chain will draw tight in that direction or *vice versa* in the other. If both chains are caught, a little bit of wind could move the spout back and forth. It is very easy to handle.

Q. It moves on a very easy pivot, does it not?

A. Yes, if these weights are in the proper position, they hold the spout at an angle, say about three degrees, or something like that.

Q. You state that when the weights are properly placed on the floor on which the tank is built, that the usual angle of the spout is about three degrees?

A. Well, as far as I know. I can't show any facts on that. One-fourth of a circle, perhaps a little more—different engine tanks would cause the spout to be lower on one than on a higher engine.

Q. On account of the different heights in the engines the water-spout is pulled in different positions and left frequently in different positions?

A. It is always left in the upright position.

Q. That is it should be left in the upright position?

A. It can't be left any other way. When released by the engine it is bound to go back in the direction of the tank.

Q. And, if in proper condition and working right, it will go back to the upright position?

A. Yes.

Q. State whether or not, with reference to all lateral motion, these water-spouts are easily moved. Whether they move sideways easily or not.

A. It would not have any side motion, if both chains are in proper position.

Q. Could it be blown by the wind?

62 A. Not to any extent at all.

Q. What did you mean just now—that it would be blown by the wind?

A. In case the chains caught, leaving it on a pivot, then the wind would move it.

Q. Suppose it was left not in an upright position, but at an angle—state what would be the movement then laterally with reference to the east?

A. There would not be any. The weight would hold it solid, keep it from any movement to the side either way.

Q. State what force it would require to move it from one side to the other—laterally—whether it is connected with the pipe or braced against it.

A. It isn't connected to the tank at all except on chains. A person can move it easy if in proper position.

Q. That is up or down or sideways?

A. Yes, there is no stated position at all for them.

Q. With reference to its construction, state whether it is intended to be easily moved up or down or sideways.

A. Yes, they are constructed that way, with convenience to move them in all directions.

Q. And swing from chains and are not attached to the tank?

A. No, not attached at all.

Q. State the position of this water-spout with reference to the tank at Goodwin as to whether it is so constructed as to hang against the tank itself or whether there is a frame several feet from the tank on the floor on which the tank is built?

A. It hangs in a frame—a frame the length of the spout.

Q. I wish you would state how this frame is constructed there—what it consists of.

A. I think it is 4 x 4 timber.

Q. The frame itself—what does it consist of with reference to the pieces?

A. Just an ordinary frame—I think three pieces.

Q. How is it fixed?

A. Separate from the tank floor in a straight up and down position, with a cross-piece at the top.

Q. What is the object of this cross-beam?

A. To hold the frame in its position.

Q. What connection has it with the chains?

A. I think the pulleys to the chains are over it.
Q. Attached to the cross-beam?
A. Attached to it or morticed into it. I never noticed how they were put in.

Q. Then, as a matter of fact, the spout, by means of these
63 chains passing over the pulleys, is in fact suspended from the cross-beams, is it not? That is, the spout connected with the chains?

A. No, it is not attached to the beam at all.
Q. I think you misunderstood me. The pulleys over which the chains work are attached to this cross-beam, are they not?
A. I don't know if they are attached to the beam or morticed. They are inside pulleys.
Q. You never made any close examination?
A. No, I never saw what kind of pulleys they were. Ordinary iron pulleys, I guess.
Q. Do you know of any eyewitnesses to this accident?
A. No, sir.

Cross-examination by Mr. WRIGHT:

Q. You spoke in your direct examination that, in your opinion, Mr. McDade was either on the side of the car, from the signals you saw, or he was on the ladder, I believe, as I understood you?
A. Yes.
Q. And, as I understood you, you drew that conclusion from facts and circumstances you saw afterwards?
A. Yes.
Q. A lantern where he must have been to give the signals and all of that?
A. Yes, sir.
Q. How far from Goodwin is this tank—about how far?
A. There is no depot there at all, and we call it the station. The tank is the station.
Q. How far were you away or about how far from Goodwin when he finished giving the signals?
A. He finished immediately after the signals were given.
Q. How far away were you?
A. A quarter of a mile.
Q. He wasn't giving the signals when he was at the tank?
A. No.
Q. You spoke something about being careful when you went under each tank. I will ask you whether or not this tank was the standard tank that is used generally on most railroads in the United States?
A. I should consider it a standard tank.
Q. And it is about like the other tanks on the road?
A. Yes.

64 Q. There may, as you say, be some difference according as a fireman may leave it, is that true?
Q. That has always been my observation of them.

Q. Do you have to be more careful of these tanks than any other obstruction? Is it not a fact that you notice everything?

A. Everything in the way, general obstructions as we call them.

Q. A careful man will notice everything that projects toward the track at all?

A. Yes, his experience will teach him.

Q. As I understand you, then, you mean by being careful that you are watchful to see that somebody doesn't leave a spout in an unusual position, so that it may hit you?

A. That would be according to a man's position and that would attract his attention at the time he would be passing. He might not notice it until after he had passed it.

Q. And it would largely depend on the angle at which he leaned out from the side of the car?

A. Yes.

Q. If he leaned far enough out he would be struck?

A. He could lean far enough out to be struck.

Q. You think it is possible he could lean that far?

A. Yes, he could lean that far easily.

Q. You mean that any general railroad man watched this so as not to lean far out enough to be struck?

A. As far away from them as possible.

Q. You made no measurements of this particular furniture car?

A. No, sir.

Q. The measurements you gave were merely your ideas about them?

A. Merely my observation of them and handling different kinds and different classes of cars.

Q. Now, for some distance from this tank west of Goodwin there is a side track that runs near the main track you were on that night, was there not?

A. Yes.

Q. How far away?

A. From the tank foundation I should judge possibly 100 feet.

Q. You stated that it was customary for brakemen to assume various position- to give signals?

A. Yes.

Q. He might stand up or sit down, that is left to him?

A. Or something might attract his attention, then he might go down the ladder a step or two to look at something on the train and then come back up again.

65 Q. These freight trains roll somewhat, do they not?

A. The cars all have a more or less rolling motion?

Q. A man could lose his balance, could he not?

A. Yes.

Q. You don't know this accident happened? You didn't see it?

A. I didn't see it at all.

Q. And everything in regard to the accident to which you have testified is just your opinion, what you think about it, your speculation of it?

A. You might say a kind of experimental idea about it.

Q. Theoretical with you?

A. Theoretical, yes.

Q. With regard to furniture cars of this kind—you have testified that the car was, you think, 13½ or 14 feet from the bottom of the car—do you mean from the track or the floor of the car?

A. From the floor of the car.

Q. That is your idea? You were asked if Mr. Kilpatrick, the claim agent of the road, was not present. Mrs. McDade is also present, is she not?

A. I never met the lady, but she is present.

Q. You came over to give your deposition?

A. I was summoned here for that purpose.

Q. And you are present now in Mr. Fitzhugh's office, giving your deposition in the presence of a lady and two children and Mr. Kilpatrick and Mr. Fitzhugh and Mr. Watson and Mr. Wright, that is true, is it not?

A. Yes.

Re-examination:

Q. Mr. Holwell, please state whether or not you know any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending as the train was pulling through Goodwin.

A. No, I don't know any reason that would necessitate his being on the ladder at all at that time.

Q. State whether or not, if he had desired to get in such a position, that is, to descend on the ladder for the purpose of looking at anything or making any investigation, what is customary with reference to carrying his lantern.

A. He would not have left his lantern there, if he had went down the ladder. He would have taken his lantern with him.

Q. His lantern was, as you have stated, in a position——

66 A. That he would naturally place it in after he finished giving the signal.

Q. And in the position the brakeman would naturally place it if sitting down on the north or right-hand side of the grab-iron?

A. It would be evidently when he leaned out to pass the signal to the engineer that he would hold the grab-iron with his left hand with his lantern in his right. After being in that position, passing it from the side of the car making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was.

Q. The engineer was on the right-hand side of the train?

A. Yes.

Q. And the proper place for the brakeman to give the signal to the engineer at that time was from where Mr. McDade was?

A. On the right-hand side, unless he had been on the first car where the engineer could see him.

Q. He couldn't see him unless he was on the first car unless he was in the center of the car?

A. No, sir.

Recross-examination:

Q. There was nothing to make Mr. McDade, after giving the signal, lean out at all?

A. Nothing known to me. He might have observed something that would have attracted his attention or watching me to see if I changed the signal.

Q. Or he might have been doing anything else—that is mere speculation?

A. Yes, sir. Speculation on my part.

Q. Is there a chain attached to that spout?

A. Yes, sir.

Q. To all these spouts?

A. Chain or rope.

Q. Did you ever have any experience, in passing these spouts if they happened to be left a little low, whether the chain would hit the caboose cupula?

A. Yes, sir.

Q. What experience have you had?

A. I have had it strike the cupola at different times.

Q. That is, when some fireman wouldn't pull it up far enough, the chain would hit?

A. Yes, sir.

Q. Did it strike that night?

A. No.

67 Q. Didn't that show to your mind at least that the spout was in its proper position—that is, pulled up at the proper angle?

A. Apparently the spout was in the proper position and the chains didn't strike the cupola window on that occasion. I was looking out for it myself, watching that it didn't break the glass in the cupola.

Re-examination:

Q. The cupola of the caboose doesn't extend to the edge of the car, does it?

—. ——.

Q. What was the height of the cupola of your caboose compared with the height of a man such as Mr. John I. McDade sitting on the front car?

A. Well, he would be, I should judge, a foot the tallest, a foot the highest.

Q. And nearer, therefore, the water-spout?

A. About 4 inches nearer.

Q. He would be, when sitting on the furniture car, in the position in which you saw him when he last gave the signal, a foot taller than the cupola of your caboose?

A. Yes, sir.

Cross-examination:

Q. This chain—hangs about how long?

A. I never observed the particular length of them. They are just long enough to make it convenient for a fireman to reach and pull the spout down. It is for that purpose.

Q. This car belongs to the I. C. road and was received by the Choctaw in the usual course of business?

A. Yes, Illinois Central.

Q. You frequently handle that class of car?

A. Yes, sir.

Q. And had been handling them since Mr. McDade had been a brakeman under you?

A. I couldn't make a definite statement as to whether we ever had one in the train previous to that time or not. I can refer back.

Q. Please do so and answer that. You did handle them frequently?

A. Yes, they are handled in the exchange of business all the time.

Q. And this car—there was nothing unusual about it, was there?

A. No.

Q. Just an ordinary furniture car?

68 A. In perfect condition as far as we know. An ordinary furniture car used in the exchange of business of all railroads.

Re-examination:

Q. Mr. Hollwell, when there are furniture cars, with a freight car intervening between the engine and the ordinary cars, or intervening between the engine and the brakeman (being wider), state whether or not they tend to obstruct the view of the brakeman giving signals.

A. From the top or sides?

Q. From the side?

A. No, they would not by reaching out an arm's-length.

Q. But you have to reach further out when on an ordinary car than on a furniture car when there is a furniture car in between?

A. It would not necessitate any great extension. A person would be in this position and there would be about 18 inches difference.

Q. Then he would have to lean out if on an ordinary freight car?

A. His body would not be that far over the car or he would fall off.

Q. But he would have to reach that far?

A. Yes, he would have to make that angle.

Q. So that the brakeman is in a better position to successfully give signals to the engineer when he is on the highest car in the train?

A. The highest car is considered the most convenient.

Q. And that is the customary place for the brakeman when the train has a furniture car?

A. No, I couldn't make that statement. It would be more con-

venient. Riding on the furniture car would rest entirely with the person occupying the position. The furniture car might ride more easy and more comfortable than the ordinary box car.

Q. And would require less leaning forward than the ordinary car?

A. Yes, a man on the furniture car could see the engine very plain and the caboose very plain, even if there were others scattered through at different locations.

Q. Mr. Hollwell, when you reached Brinkley and were informed by the brakeman, Mr. Kennedy, that Mr. McDade was missing, please state whether, if any, effort you made at that time to discover him and what requests, if any, you made to be permitted to make search for him and the result thereof.

69 A. Well, at the time we come to the conclusion that he was missing we had looked around the train as much as we could and still saw his lamp up there. As I say, this passenger train was so close to us, Mr. Kennedy and I put our train away, leaving his lantern set on top, thinking, if he was anywhere in the vicinity, he would come and get that first, and, of course, by its being gone, we would know he was around. After we cleared the main line for No. 3 I consulted with the engineer and we compared notes and went back and looked at the car and still made additional searches, called to know if he could get an answer from him. Then I went to the office and reported to headquarters that the brakeman was missing and that I knew he was on the train at Goodwin, and that we must have lost him between Goodwin and Brinkley, and I asked the dispatcher to give me orders to go back with the engine in search of him, and by that time No. 3 if he had seen anything of him anywhere, if he got any signal from anybody to indicate that he had seen any one, and he had not seen any one at all. Then I asked the dispatcher to give me orders to go back and look for him. The dispatcher suggested that I continue with my work in Brinkley, and that we let No. 2, the east-bound passenger, look for him carefully, as they had an electric headlight and would show everything plain, and if they could not find him, that I should go back. They would report on arrival at Forrest City and I should go back.

Q. What time did No. ". passenger pass Goodwin?

A. I don't remember the time that No. 2 would pass there now. Let's see. They were due at Brinkley at about 2.40, that would make them due at Goodwin about 3.05, something like that. I know they met No. 3 at Jones ——, the first station west of Brinkley. That was their meeting point.

Q. You stated at Forrest City you gave orders to the train to pass No. 3, was it?

A. To go ahead of No. 3.

Q. To go ahead of No. 3, at what point?

A. To Brinkley.

Q. To go ahead of No. 3 to Brinkley?

A. Yes.

Q. And this order was communicated to the engineer through Mr. John I. McDade, head brakeman. Please state now what effect,

if any, so far as you were able to observe, did this order which you communicated through Mr. McDade have upon him so far as his attentiveness to signals given or expected to be given by you on the train as it went from Forrest City to Goodwin——

A. To Brinkley. Well, it would have the effect that he would be more observant, expecting that I might change the signal on the order at any station. That is, he would be watching more attentively for me to do that.

Q. And so far as you were able to observe, it did increase his attentiveness to signal you?

A. Yes, sir, that is for a change in signals. Of course it is customary that we are *privileged to give one signal and contradict it* immediately afterwards, in case we would observe something that would necessitate a change in the program.

Recross-examination:

Q. As a matter of fact, there was nothing that made you change that night, was there?

A. No.

Q. What was there to lead him to believe——

A. That I might give the go-ahead signal before I knew.

Q. That is a speculation, isn't it?

A. No, it is a customary rule. Lots of times when the engineer whistles, it is always customary to give the signal immediately as soon as he quits whistling.

Q. Do you mean that it is customary for you to tell a man certain orders and change them immediately?

A. Countermand them almost immediately. It is done in frequent cases, in all cases you might say.

Q. Then why do you give the orders, if——

A. Well, we see something that causes us to change them.

Q. That may happen and it may not, is that a fact?

A. That is it.

Q. Sometimes it is done and sometimes it is not done?

A. Take an example of the case. I might be sitting up there doing something else and he would whistle for the station. As soon as he quits whistling I would give the signal to go ahead, and after I gave that signal might look out and see a train on fire or a hot box or something of that kind that would necessitate immediate attention and stopping of the train. I would not see that before I give the go-ahead signal.

Q. That is something that might arise or might not arise?

A. That is something that might arise or might not.

A. That is a supposition at all times.

Q. In a sense, it is speculation too, isn't it?

A. Yes.

And further saith not.

To question reading: "Where was the head brakeman?" and answer, "I couldn't say—that is on what particular car he
71 was on. Circumstances show that he was about eight or ten cars from the engine." Counsel for defendant objected, which objection the court sustained. (See page 37).

To the ruling of the court the plaintiff duly excepted.

Question on page 38 as to where McDade was sitting was also objected to by counsel for defendant.

Judge HAMMOND: "The trouble is the witness' answer is not responsive to the question. He is asked where he was standing to the best of your knowledge at the time he was giving these signals as the train was pulling into Goodwin. That question assumes that McDade was standing and he answers, from the position of his lamp, and the signal, I judge he was sitting on the edge of the car." He says he was sitting on the edge of the car from the position of his lamp and the signal. As I understand it, he isn't speaking of the lamp he saw subsequently in the grab-iron of the car, but is talking of the position of the lamp at the time he gave the signal. I infer that is what the witness means and Mr. Wright's objection is not good and Mr. Fitzhugh is correct in this. The opinion of a witness, as I have ruled a little way back as to what the circumstances show, is not good, he must give the circumstances, but what a witness sees, although it may be given in the language of an opinion, is good. If you say a man, when I saw him, was stooping. Mr. Wright's theory is that he couldn't say he was stooping, as that is a conclusion from what he saw. He would not have to show what the anatomist and the doctors would say were the circumstances when a man was stooping, but that situation creates in his mind the common and every-day description, although given in the language of an opinion, that the man is stooping. While in one sense it is an opinion, it is a statement of facts and that constitutes a well-established exception to the rule about evidence. When a man stoops his opinion is not in fact an opinion, but merely descriptive of a situation and condition which the party sees. He may testify to that and describe what he sees by giving his descriptive sort of opinion about the conditions as they exist. I think Mr. Fitzhugh's question comes within that and Mr. Wright's objection is overruled.

Counsel for defendant excepted to the ruling of the court.

Mr. WRIGHT: "I object to the next question where he says he must have been sitting down." "You saw the signal given and you could tell whether he was sitting down or standing up?" "A. Yes, sitting down or standing on the ladder at the side."
72 "Q. Didn't you say that he was sitting down?" "A. I said he must have been."

The last question is objected to.

Judge HAMMOND: "That is only following up what he has already testified."

Counsel for defendant excepted to the ruling of the court.

Page 40, answer to question: "Did he report to you?" is stricken out with the exception of the mere statement of fact that he did report.

Page 40. "When you passed Wheatly Station what signals were given?"

This last question was objected to by counsel for defendant who excepted when the court overruled the same.

Judge HAMMOND: "Any signals showing that the brakeman was missing after he passed Goodwin, before the car stopped, I think competent."

Page 41. "You say Mr. Kennedy replied when you asked him where McDade was when the train passed Brinkley?"

This question withdrawn.

Page 41. "Did he say where he last seen him?"

Also withdrawn.

And the two questions immediately following are also conceded by Mr. Fitzhugh to be incompetent.

Page 42. "Mr. Hollwell, did you testify at the coroner's inquest held over the body of Mr. McDade at Forrest City, Arkansas?"

This question Mr. Fitzhugh conceded to be incompetent.

Question- in regard to witness going to Forrest City for the purpose of attending the coroner's inquest are also withdrawn.

Question: "When was his body first discovered and by whom, if you know?"

Also withdrawn.

Last question on page 42 and first question on page 43 and the answers thereto are withdrawn, and are not read by plaintiff, to which action on the part of the plaintiff counsel for defendant objected.

Judge HAMMOND: "The rule is well settled that the party offering the deposition may offer it or may withhold it and read or withdraw such parts as he chooses, and the party on the other side can read it as his own deposition but taken by the adversary and not read by him."

Counsel for defendant excepted to this ruling on the
73 ground that he should be allowed to read the omitted portions of depositions, not as evidence on behalf of the defendant but as a portion of plaintiff's evidence.

Page 43. Question. "State whether or not you ever made any observation in regard to it personally." Ans. "Nothing, only to be careful to be out of the way of it." Question. "You had to be careful to be out of the way of it?" Ans. "Yes, sir."

Defendant's counsel objected to these questions and answers, and excepted to the action of the court in overruling same.

The question, "What is the usual custom of head brakemen on your road and others in regard to their positions when passing stations?" (see page 45) was also objected to by Mr. Wright and said objection overruled by the court, to which ruling defendant duly excepted.

Page 45. "Then at the time this train was pulled into Goodwin, Arkansas, on the night of August 19th, Mr. McDade was in the discharge of his duties?" That portion of the answer to this question that Mr. McDade was in the discharge of his duty is objected to and

the same is overruled. To the ruling of the court defendant duly excepted.

To the question, "State what his character was with reference to his efficiency, carelessness or prudence," (see page 49) counsel for defendant excepted.

Judge HAMMOND: "The question is admitted as to his general reputation as a brakeman as to the estimate of damages, but for the purpose of showing whether on this particular occasion he was careless or careful in his habits it is excluded."

To the ruling of the court plaintiff excepted.

To the question, "To the best *of your knowledge* and belief, from you seeing him give the signal, you think he was facing north on this furniture car," (page 50), counsel for defendant objected, which objection was sustained, plaintiff excepting.

Page 51. Question. "Mr. Hollwell, state whether your observation of this spout has been greater before or since this accident." This also was objected to by Mr. Wright, the court sustaining the objection and plaintiff excepting.

Mr. Wright, after reading the first two questions of the cross-examination of witness, renewed his motion to exclude that portion of the testimony on page 37 to which objection was made.

Judge HAMMOND: "I do not think this witness can destroy whatever value the jury may give to his testimony as an eyewit-
74 ness to this signal at the last time that McDade was seen by subsequently saying that he makes up his opinion from what he afterward saw, because he shows from his statement that he saw it the time he made his answer, and certainly there must have been some element in his testimony and it is for the jury to say how far he is to be believed, and it is for you, gentlemen, to argue as to what effect these conflicting statements have. I don't think Mr. Wright has a right to have what was originally said excluded because the witness afterwards gives an account of why he stated that, when the facts show that he was, at the time when he gave the signals, absolutely observing him. The motion is overruled."

To the ruling of the court defendant excepted.

To the first question on re-examination, "State whether or not you know of any reason in the world why the head brakeman, Mr. McDade, might have been on the ladder, either ascending or descending," counsel for defendant objected. This objection the court overruled and defendant excepted to the ruling of the court.

To the question on page 58, of re-examination, "He would not have left his lantern there if he had went down the ladder. He would have taken it with him," counsel for defendant objected, which objection the court overruled, and to said ruling defendant duly excepted.

To the following testimony in re-examination counsel for defendant objected, viz.:

"Q. *His* was, as you have stated, in a position——

A. That he would naturally — placed it in after he had finished giving the signal.

Q. And in the position the brakeman would naturally place it in if sitting down on the north or right-hand side of the grab-iron."

Said objection was overruled and to such ruling the defendant duly excepted.

Question and answer No. 2, on page 61, were withdrawn by plaintiff.

Page 62. Question. "And so far as you were able to observe, it did increase his attentiveness to signals from you," *were* withdrawn by plaintiff.

And R. H. BRIGGS, being duly sworn, next deposed as follows:

Direct examination:

Q. What is your name?

A. R. H. Briggs.

75 Q. What is your business?

A. A master mechanic.

Q. Are you connected with any railroad?

A. The Kansas City system.

Q. What railroads does that system embrace?

A. The K. C. F. S. & M., K. C. & Springfield, and K. C. M. & B.

Q. How long have you been in the railroad business and how long have you been a master mechanic?

A. I have been in the railroad business half a century the 2nd of next month.

Q. How long have you occupied the position of master mechanic?

A. About 38 years.

Q. Has your position as master mechanic during that period of time enabled you to become familiar with the construction of proper and standard water tanks used by railroads?

A. Familiar with the construction of them?

Q. Yes.

A. Yes, sir.

Q. Mr. Briggs, I wish you would state now what is the proper standard railway water tank with reference to the position of the spout and the tank—the tub—when the spout is not in use.

A. The spout is suspended on what we term a gallows frame. The side next to the tank two chains run from the gallows frame over pulleys with a weight at one end and the spout at the other. The weight is sufficient to pull the spout back to a vertical position when not in use.

Q. Is that the proper position of the spout when not in use?

A. Yes, sir.

Q. How is this position maintained—did you say? What is necessary?

A. Weights.

Q. And what else? The weights rest upon what?

A. The weights drop down to what you call a foot-board, a plank, and the spout should be vertical.

Judge HAMMOND: "Absolutely vertical?"

WITNESS: "Yes, sir; that is the intention."

Q. Now, how are they constructed and maintained by railroads with reference to the nearness to passing trains. What is the proper position of these water-spouts on the standard water tanks under those circumstances? State whether or not, when in proper position, they will clear the car and person sitting on the side of the car?

To this interrogatory counsel for defendant objected, which objection was sustained by the court.

76 Q. Mr. Briggs, describe the relative positions, as near as you can, of the water-spout with reference to a passing train.

A. Well, it should be cleared.

Q. How much should they clear?

A. I can't tell you exactly. I have never located a tank myself. There is a regular standard that the road department conforms to. I know they must absolutely clear it.

Q. You say they are intended and constructed—the standard tanks—so that the spout should be in a vertical position when not in use?

A. So that it will clear everything.

Q. What do you mean by everything?

A. Everything in the way of the car or a person on top.

To this last question and answer defendant's counsel objected, the court overruling said objection, to which the defendant excepted.

Q. Mr. Briggs, if the spout and appurtenances—that is the chains and weights—are properly adjusted, how will the spout hang when not in use?

A. Perpendicular.

Judge HAMMOND: "Why don't you ask Mr. Briggs to tell us in his own way what is the construction of that sort of appliance, according to the latest art."

Q. Tell the court and jury how those appliances, to wit, the weight, spout, chains, tank and pulleys, are constructed and adjusted according to the present state of the art, and according to the standard adopted by railroads.

Mr. WRIGHT: "I would like to make this objection. Mr. Briggs has not qualified as an expert on other roads. If he knows the general custom on well-regulated roads."

Judge HAMMOND: "I should think we might assume that a master mechanic on a railroad will know that."

Q. Does your experience in railroad business covering a period of 50 years, give you familiarity with the construction of water tanks to sufficiently enable you to testify as to what is a proper structure and what is the standard adopted by various railroads?

A. I should say so myself.

Q. From that knowledge and experience, please state to the jury what is a proper structure of that character.

Mr. WRIGHT: "That is objected to on the ground that it is not a question of opinion."

Judge HAMMOND: "What officer in a railroad company locates and builds these structures?"

WITNESS: "They are put up by the roadmaster generally—the superintendent of buildings and bridges. I have had con-
77 trol of the water service on the K. C. M. & B. for the last ten years. The first of this year that was taken from under my charge and put under the bridge and building department."

Q. But for ten years you had control of the water department?

Objected to and withdrawn.

A. You wanted me to tell the jury the proper construction——

Q. Of those tanks and appliances—how they are constructed.

A. I would have to have a blackboard and a piece of chalk to illustrate that. Let me have that photograph you have there, and, if any of the gentlemen do not understand that, I will explain it. That represents a water tank with all appliances necessary to take water.

Q. What tank is that?

A. I wouldn't say. It looks very much like the tank at the K. C. shops.

Q. You say that represents the tank with its appliances?

A. Yes, sir.

Q. Explain to the jury the different appliances.

A. That is a standard railroad tank with all appliances. It would be rather difficult to explain to the whole jury.

Q. Stand nearer to them.

A. The best way to explain this is for the jury to ask questions and for me to answer, after I first put you on to what the thing is. This represents the spout here. That spout is pulled down when the locomotive stands here.

Q. To an opening in the water tank of the locomotive?

A. Yes, this pulls the valve open and the water flows into the tank. After the tank is filled with water the man turns it loose and it comes up by means of a weight here. This weight is here and that is attached to a chain that passes over the pulleys represented here and that runs down to the tank. The distance between this weight and this spout should be sufficient to pull this spout up to a vertical position when at rest, and not do anything.

Q. Now, Mr. Briggs, suppose it did not go up to a vertical position when not in use—what would that show?

This last question objected to by Mr. Wright, said objection being overruled and defendant excepting to the rule of the court.

Q. Suppose the spout did not go up to a vertical position when it was let loose and not in use, what would that show with reference to the appliances?

78 A. It would show that the weight struck this cross-piece to- soon, or that the chain is too long. I could give further information to show how this does happen.

Q. Do that.

A. Oftentimes the spout gets rammed up or smashed through the carelessness of firemen in taking water, and they have to take the spout off and put another on and the other spout is generally in the shop ready for an emergency of this kind, and, in making the spout in the shop they are not particular about getting the same size, so this band will go a little further and others will not go down so far, and if they won't go so far, the result is this will strike to- soon and the spout won't go up high enough and the weights don't come down here by some distance.

JUROR: What is the position of the spout when the water is running into the tank?

A. Like my pencil stands. Here is the outlet for the water here. See that pipe neck comes from the tank and runs out there.

JUROR: Whose duty is it to put that back in the proper shape?

A. If you turn it loose it will go back itself.

Mr. WRIGHT: "All this is objected to."

Said objection was overruled, to which ruling defendant excepted.

Q. Mr. Briggs, if the band to which the chains are attached—the band around the spout to which the chains are attached which go over the pulley, is in the proper position with reference to the spout, and the chains are of the right length, will the spout go back automatically?

A. It has got to go to a vertical position. It can't help it.

Q. And the weights are they to pull it back to that position?

A. Yes, sir.

Q. It wouldn't make any difference how a fireman would leave it, if the appliances are in proper order, it would go back to the proper position?

A. Yes, sir; of its own accord.

Q. Now, Mr. Briggs, you say that the spout automatically goes back to a vertical position when the chains are of the right length and the band around the spout in proper condition. Now, assuming that the slant of the spout, when the weights rest on the floor or platform—that is when the spout is not in use—that slant amounts to as much as 2 feet and 8 inches in a length of 9 feet, the spout being 9 feet long, the slant 2 feet 8 inches in that length.

79 Please state whether that would conform to the present state of art and of the standard tanks and spouts.

A. It would not be as I would want to have it.

Mr. WRIGHT: Objected to this last question and answer, which objection the court overruled, defendant duly excepting.

Q. What would that slant show with reference to the way the spout was hanging? That is was perpendicular or hanging at an angle different from that found in uniform, standard tanks?

A. It would show that it was hanging at an angle, of course.

Q. If hanging at that angle what would it indicate—with refer-

ence to the length of the chain or the position of the band around the spout, what would it indicate?

A. That the chain would be too long.

Q. Suppose, instead of the slant being 2 feet 8 inches in a length of 9 feet, that the slant was 3 feet and 8 inches?

A. It would indicate a still longer chain.

Q. State whether or not a spout, hanging at either of those slants, with a chain of the length necessary to make the spout hang at either of those slants—whether that spout and its appliances would conform to the uniform standard appliances used by railroads?

A. It would not.

Cross-examination:

Q. I will ask you if you know anything about photographs, Mr. Briggs?

A. Nothing more than I know it when I see it.

Q. As a matter of fact this picture was taken from this side, was it not?

—. ——.

Q. When a picture is taken from the side, it doesn't show the angle that the spout leans over, as if it were taken from the front—is that not a fact?

A. No, sir.

Q. Suppose this is the spout here—if you have the sight where you are—which I call the front—you can see through here and the nearer you get around this side the straighter the spout appears. I am talking about the front of the angle, not the spout.

A. Put that question again.

Q. If in front of the angle, taking a picture, it shows the spout leaning over much more than if taken at the side of an angle?

A. You mean turning it this way—yes.

Q. This picture was taken from the side of the angle, was it not? In other words, you can take photographs of any object on
80 different sides and show a different state of affairs, isn't that so? You can take a photograph from different angles by putting the instrument at different places and show a greater or less angle on the photograph?

A. As a photographer, I couldn't answer that. Taking a view with your naked eye, I believe you are right.

Q. You say this picture, as taken, that is the way a tank is now?

A. I know something about that tire right there and it must have been at very little angle, if it took that tire the way it is. That tire is laying at that place now, and, if you had stood far off this way to have taken it, as you say, you would not have taken that tire.

Q. I thought you said that you didn't know anything about photography?

A. I am stating according to your illustration.

Q. Didn't you state that, according to your eye, that would be so? You don't know where this is taken?

A. I know I can't stand behind that tank and see that tire.

Q. But you can stand at the extreme edge of the tank and get the tire?

A. That may be, as long as I don't get around the corner.

Q. You can get clean to the edge of this large tank here and put it at that angle and catch the tire, isn't that true?

A. Let me illustrate what I mean.

Q. Isn't that a fact?

A. I don't know whether it is or not. Suppose there is a tire standing at that door against the wall. I can see it here or there or any other point of the room, but, if I go inside that door, I can't see it. Now, I know where that is and I say it couldn't have been at such an angle as you wish to represent it to be or make it appear that it was, because I can tell where the tire is and I know I must have been out from the wall of the tank to see the tire.

Q. How do you know what I want you to testify to?

A. I am only judging.

Q. You, of course, are naturally interested in proving to the jury that your conclusions are naturally correct?

A. No, I don't care a cent about it one way or the other. I would prefer not to be here.

Q. Mr. Briggs, why did you state that it could not have been at the angle I wished it to be? Do you know the angle I wished it to be?

81 A. I merely judge you want to make it appear favorable to your side.

Q. And you want to tell the jury it couldn't be favorable to my side?

A. No, no.

Q. Haven't you just said I wanted to make it appear favorable——

A. Judging from the way you illustrated with the box and pencil.

Q. Let us take that water cooler. You can see that water cooler and can see it until you get clean into this room, can't you?

A. Yes, sir.

Q. The same way here. You could have taken that tire, as you have stated to the jury, until you got behind the house?

A. Yes.

Q. You never made any experiments as to angles—you are not a photographer?

A. No; I am not.

Q. This, as you consider, shows a standard tank, spout and all in a standard position?

A. Yes, sir.

Q. You have also stated that a standard spout would be in a vertical position?

A. That is the way it should be.

Q. And this picture shows it all?

A. I do not say that spout is exactly vertical.

Q. Didn't you tell the jury that this picture represented the spout the way it ought to hang?

A. I will say, if it is that near to a vertical, it will be sufficiently so.

Q. Then, you are wrong in your statement that it must be in a vertical position?

A. The builders of the tanks say that they must hang in a vertical position.

Mr. WRIGHT: "I ask that that answer be excluded."

The court excluded said answer.

Q. You have stated that this photograph showed a standard tank and spout as it should hang, but this don't hang vertically?

A. Well, we will admit that it don't.

Q. You must admit, if this is standard, that tank may hang at an angle and be standard—that is so, isn't it?

A. No, I do not admit that.

Q. Yet, you have told the jury this picture shows a standard tank and spout and all, and, at the same time, admit that this is
82 not vertical and you have told the jury likewise that it ought to be vertical but this is not vertical, is it?

A. It is no excuse for me, if it ain't.

Q. It that any excuse for your telling the jury this is standard and now saying it is not?

A. I say that is a standard tank.

Q. Didn't you state that this is the way the spout should hang until I called your attention to it?

A. I don't recollect whether I said that or not.

Q. Didn't you testify to the vertical position?

A. I said it should hang vertical.

Q. Didn't you state to me about the way the photograph was taken and the angle at which it was hung and combat my idea on that What roads, Mr. Briggs, are you familiar with, with regard to the way spouts hang now—not now—last year?

A. I am only familiar with our own road.

Q. You are only familiar with your own road. You don't know what the general custom of other roads is with regard to the way they hang their spouts throughout the United States from your observation?

A. I know this Mr. Wright. That there is a different height of cars in the interstate-commerce business and you—there is a rule that these spouts must hang above them and clear them.

Mr. WRIGHT: "I object to that answer on the ground that it is not responsive."

Q. You are not familiar, as you have stated, with the way they do actually hang, as a matter of custom and practice, on other roads than your own?

A. I am only familiar with it in this way. I know that the variety of heights in cars would compel the road to conform to the same standard.

Mr. WRIGHT: "Also objected to this answer, and said objection was sustained by the court."

Judge HAMMOND: "Answer his question; any further explana-

tions can be brought out by questions which will give you an opportunity to explain."

Q. As I understand, by your observation, you do not know what the usual practice is in the hanging of these spouts on other roads?

A. I have not gone over the roads to look.

Q. You do not know from your observation?

A. Not from personal observation.

Q. Over your own road, too, as a rule, the spouts of tanks all over the road, as they take water along the side of the road, hang vertical, and are built so that they will come back to an absolute vertical position?

83 A. Let me answer that question in such a way that it will be understood. Our rules are that the spout hang vertically.

Mr. WRIGHT: "Objected to this answer, and the court sustained said objection."

Q. Mr. Briggs, I will ask you this question: Do you know, over your road, how the spouts hung, from your observation, at other places than down at the shops here—how they actually hung prior to the 19th of August, 1900?

A. They hung in various ways.

Q. Well, they did not all hang vertical then, did they?

A. They did not.

Q. When did this become a standard? To hang them vertically? Is that recent? How long has that been in force?

A. On our road ever since it has been a road.

Q. You do not know as to other roads?

A. No, sir.

Q. Other well-regulated roads in the United States. You say, however, on your road they hang in various positions?

A. Yes.

Q. It is not very much more convenient for a fireman to pull this chain here to pull the spout down from the tank for the spout to be at an angle than for it to be perfectly vertical?

A. He can reach the chain easier, yes.

Q. Do you know the measurement of this supply pipe from the track?

A. No.

Q. I would be pleased if you would get me those measurements from the supply pipe to the tank. This tank situated down in your shops you have a heavier pressure on that.

A. Twenty-five pounds to the square inch when it is full.

Q. Out on the road you do not need so much pressure?

A. No, sir.

Q. Down at your shop, on account of the pressure you need, you have put the tank up high. Down on the road it is about down in here even with the platform?

A. Yes, sir.

Q. The reason of that is because you need more pressure in your shop. This doesn't show the ordinary road tank, as I understand?

A. No.

Q. Is this tank down there in good condition?

84 A. Yes, sir.

Q. In this picture does a car pass under this supply pipe here? Is that supply pipe higher than the car or not?

A. I don't exactly recollect. I don't believe a car could pass under here.

Q. Could it pass under the bottom of the spout?

A. I think the car would be higher than where the outlet is.

Q. Take the car under the spout in this photograph—you think the car would be higher than the spray spout?

A. I think it would be higher.

Q. I am speaking of the bottom of the sway pipe.

A. I know that that is lower than the car—we often rake the sides of a car going by. This particular tank was built a little too close to the track, and we have to watch out.

Q. You say this tank here is built a little too close to the track?

A. It is a standard tank all the same.

Q. You know of the Texas Pacific road, do you not?

A. I have heard of it.

Q. That is considered a well regulated road?

A. Yes, sir; I would judge so.

Q. The Iron Mountain road is considered a first-class road?

A. Yes, sir.

Q. I will ask you if you know whether the sway spouts on those roads hung at an angle or not?

A. I could not say.

Re-examination:

Q. Speaking of spouts on your own road, state whether or not, from your observation, the spouts all hang in position so as to clear any car or person on the car. Is that a fact? The spouts on tanks on your road hang so as to clear the car or person on the car?

A. It oftens happens that they do not. That is what we foreman and master mechanics are for—to make men do their duty.

Q. What is it caused by when they do not hang that way?

A. Inattention to their duty. They do not go according to instructions.

Q. What is the cause of it hanging at this angle so that it would not clear the car?

A. Different causes. One, the spout might have been dam-

85 aged and they had to change it. If the ring on one spout is here and they set another with the ring here, that makes the chain too long and it hangs over. They might put new chains on, but that seldom happens. But the main cause is the spout get- mashed. The fireman will give the engineer the signal and the first thing he goes and mashes it and they send another spout there and the men are not particular enough about putting this band in the right place and that will control the position in which the spout hangs.

Mr. WRIGHT: "Objected to this last answer."

Judge HAMMOND: "The plaintiff has a right to inquire as to what

is the proper construction for these appliances with reference to the safety of those men. The objection is overruled."

And to said ruling defendant duly excepted.

Q. If they are properly constructed, and the appliances in the condition required for standard, uniform tanks, then they will clear the cars and any person on the cars?

A. Everything.

Recross-examination:

Q. They would not clear everything. If a man would get on a ladder and lean out, he could get -it?

A. If he fixes himself so he could get hit. We do not figure on having men on the sides of the car—simply to clear cars and locomotives.

Q. You figure to clear cars and locomotives and do not figure with regard to the construction of these pipes; do not take into consideration that men have to get down on the side?

A. There is plenty of room for them to get there, if they want to.

A. If they are fools enough to do it.

Q. If they are fools enough to do it, they would be hit by your tanks?

A. I don't know about that. I don't think so. I liked to have gotten killed myself once, but I was to blame for it.

Q. If a man was seated on a car and holding onto a grab-iron, he could lean his body far enough out so as to get struck?

A. I think he could.

Q. And you mean by clearing every one on the car, it would altogether depend on the position that the man was in, wouldn't it?

A. I mean the man could place himself probably in such a posi-
t-on he could be hit.

86 Q. Negligently——

A. I don't know, it would be a right awkward man to get in that position.

Q. That is just your speculation. I am asking do you know. Take on your own road, if you build these tanks so that they will clear the cars and locomotives, that is their fundamental purpose?

A. And they more than clear it. Not so they will just clear it. More than clear it.

Q. They will clear then how far from the butt of the tank?

A. I can't tell exactly, but all of probably two feet.

Q. Two feet from the foot of the sway spout?

A. And I guess more than that, because there is such a variety in the width of cars. I wouldn't be surprised if it is over three.

Q. You would not be surprised if it were over four?

A. I know it wouldn't be that far.

Q. Why did you say two and now you say maybe over three? What is your idea, if you have any, on that subject?

A. Because all thoughts and ideas do not spring spontaneously in a mind. You ask the question and I have to think over it. I may speak too quick and have to correct myself.

Q. You never made any measurements?

A. I have made them but I don't remember. I can go to my office and tell you exactly how far it should be.

Q. You say that this spout is no near to the track that sometimes you have had cars that scrape the bottom of the spout?

A. That is right.

Q. If a man is on one of those, he will get scraped off, if he is on the side?

A. That tank wasn't put there with a view of passing cars by it. It is there for the accommodation of the stationary engine. You only have one side of that tank. The side that would be scraped is on this side—there is a pipe on the other side.

Q. Is there a track on the other side? The other side is not a standard tank, is it?

A. It is. It is a standard tank placed in the wrong position.

Q. Then it is not a tank usually kept on well-regulated roads, is it?

A. It is larger than is used on the line. That is a sixty-thousand-gallon tank, and they generally use three thousand.

87 Q. At any rate, you stated that all your tanks are standard tanks *an* the K. C. road?

A. Yes, sir.

Q. Yet you state you have got a tank and you have noticed freight cars going by which have scraped the bottom of the freight cars?

A. These freight cars were not in a train.

Q. But they scraped, did they not?

A. Yes, sir.

Q. You have also stated that it is the purpose in building a tank not to have it scrape?

A. The purpose in locating it is not to have it scrape. This thing was not located exactly right.

A. And, therefore, it is not what you would call a first-class tank?

A. It is with a doubt.

Q. Then, there are some first-class tanks, you think, that would scrape a car as it passed by?

A. Some first-class tanks that cars will scrape. The tank does not scrape them.

Q. Now you say there are some first-class tanks that the cars will scrape?

A. I do not say so. I do not know but one in the world. That is at our shop. Under the conditions it is alright, nobody can be harmed by it.

Q. The car can be harmed?

A. Not materially.

Q. The spout can be harmed.

A. No, it is a cast-iron spout.

Re-examination:

Q. Mr. Wright continually asked you whether the tank was standard or first class. You mean by that the tank itself or the location?

A. I mean the structure.

Q. You might have a first class located in a wrong place?

A. Yes, sir.

Q. It is known, when these structures are placed, that brakemen are accustomed to riding on top of the cars and sitting on the side—that is customary, is it not? It is customary for brakeman in the discharge of their duties, to frequently ride on the side of cars?

A. I have seen them do it, yes, sir.

Q. If sitting on the side of the car, just sitting on the side—not down on the ladder, but sitting on the side of the car—please state whether or not standard spouts are intended to clear the car and persons so sitting?

88 A. It would, if it were in the proper place.

Recross-examination:

Q. Did you ever see any brakeman pass this tank on cars?

A. This of mine, no, sir. They have no business there. When the car is in that place it is just shoved in for unloading.

Q. You have seen brakeman pass under spouts?

A. I didn't say that. I said, if they are in proper position, they cannot be hit.

Q. But you did not — them?

A. Yes, I have seen them often. I have a case of one that got knocked off because he wasn't in the right place.

Q. You do not want to argue the case, do you?

A. I want to do just what is right. I don't want to hurt your feelings, but, not being accustomed to your manner of questioning and all that, I do it in all due respect.

Q. I asked the question, did you ever see, you have seen a man going under these spouts sitting on the side of the car; did you ever see that?

A. I can't say I have seen him going under.

Q. Or go by it?

A. I have seen him go by it.

Q. Sitting on the side of the car?

A. Yes.

And further saith not.

It was here admitted by counsel for plaintiff and defendant, without the necessity of proof, that the body of deceased, John I. McDade, was found between the main track and the spur track, 675 feet west of this tank. His body was found about 3.05 o'clock on the morning of August 19th, 1900.

Mr. G. P. WALKER, being duly sworn, next depose- as follows:

Direct examination:

Q. What is your name?
A. G. P. Walker.
Q. Where do you live Mr. Walker?
A. I am staying at Forrest City, now.
Q. How long have you been living at Forrest City?
A. Since the first of January, 1901.
89 Q. Where did you live prior to January 1st, 1901?
A. At Goodwin, Arkansas.
Q. How long have you lived at Goodwin, Arkansas?
A. The last time I moved back there it has been about a year and a half.
Q. You have lived there prior to the time you moved back last?
A. Yes.
Q. What was your business while at Goodwin?
A. Merchandising.
Q. Are you engaged in that business now at Forrest City?
A. No, sir; I am keeping books now.
Q. Is there a water tank situated there at Goodwin?
A. Yes, sir.
Q. A railroad water tank operated by the Choctaw, Oklahoma & Gulf R. R.?
A. Yes, sir.
Q. Where is it located with reference to the town?
A. It is on the west side of the town, a little west of most of the houses there. You might say in the western part of the town.
Q. Is it visible to the people right there in town?
A. Yes, sir.
Q. On what side of the track is it?
A. On the north side.
Q. How far was it from the place where you had your store?
A. About eighty or ninety yards.
Q. Right in view of your store?
A. Yes, sir.
Q. Did you have occasion to make any measurements of this tank and the water-spout there at that time?
A. Yes, sir.
Q. When and under what circumstances were these measurements first made by you?
A. Mr. Young, the assistant claim agent of the Choctaw, was there and I helped him take some measurements.
Q. Mr. Young, the assistant claim agent of the Choctaw R. R., was there and you assisted him?
A. Yes, sir.
Q. Was this done at his request?
A. Yes, sir; I helped him at his request.
Q. Do you remember of hearing of the death of John I. McDade, brakeman on the Choctaw road, there at Goodwin?
A. Yes, sir.

90 Q. With reference to this time, when were these measurements made by you and Mr. Young?

A. Made after that.

Q. How long after?

A. About two weeks, I think. Something near that. Maybe not so long.

Q. State, if you know, whether the tank and the spout and its appliances were in the same condition at the time you took these measurements as before the accident or at the time of the death of the party?

A. Yes, sir.

Q. Please state, now, how this spout hung at that time—at the time the measurements were taken by you and Mr. Young, with reference to the upright to which it was attached?

A. It was at a considerable slant at the time they were taken.

Q. Mr. Walker, did you measure—you and the assistant claim agent of the Choctaw road—measure the height of the supply pipe; the pipe that runs from the tank against which rests the sway pipe from the ground?

A. Yes, sir.

Q. What was the height of that supply pipe from the ground above the ground?

A. Twelve feet.

Q. What was the length of this spout or sway pipe?

A. Nine feet.

Q. Of what material was this sway pipe or spout made?

A. I think it was galvanized iron.

Q. About what was its diameter?

A. It was about 8 or 10 inches at the small end and 12 or 14 at the larger end.

Q. State, if you know, from the measurements taken at that time with Mr. Young, what was the distance from the end of the supply pipe—that is, the end where the sway pipe or spout touches the pipe running into the tank from the first rail?

A. That is the perpendicular line?

Q. Drop a perpendicular line from the end of the supply pipe down to the ground. What was the distance from the point where this perpendicular line touched the ground to the center of the first rail—the pipe that goes into the tank—the stationary pipe, did you take that measurement?

A. Yes, sir.

Q. What was it?

A. Four feet, three inches.

91 Q. In other words, the distance from this end of this stationary pipe—that is, the end nearest the track where the sway pipe is against it to the center of the nearest rail of the railroad track was four feet three inches?

A. Yes, sir.

Q. That is, a horizontal line, from the sway pipe to the railroad track the center of the rail, would be four feet, 3 inches?

A. Yes, sir.

Q. State whether you took a measurement of the distance from the end of the sway pipe or spout nearest to the track—the top of it —when it was pulled up, the weights resting on the platform to the center of the rail?

A. Yes, sir.

Q. How did you take that measurement with Mr. Young?

A. With a line.

Q. Did you drop a line from the top of the sway pipe nearest to the track down to the ground and then measure the distance from that line to the nearest rail?

A. Yes, sir.

Q. What was that distance?

A. Four and a half inches.

Judge HAMMOND: "That is the upper end of the sway pipe?"

Ans. "Yes, sir; drop the line from the upper end of the sway pipe and that is the distance to the center of the first rail."

Q. That is the rail nearest to the structure?

A. Yes, sir.

Q. At the time you took that measurement, state whether the chains were taut and the weights resting on the platform?

A. Yes, sir.

Q. In other words, it was in the position it remained when pulled up?

A. Yes, sir.

Q. At what slant would those measurements show the sway pipe or spout to be at that time?

A. It would be about 3 feet 10 inches.

Q. You say, from a perpendicular line dropped from the lower end of the supply pipe, the stationary pipe connecting with the tank, from a perpendicular line dropped to the ground, the center of the rail is four feet three inches?

A. Yes, sir.

Q. And from a perpendicular line dropped from the top of
92 the sway pipe when it is in its usual position, the weights resting on the platform, the measurements was 4½ inches to the first rail?

A. Yes, sir.

Q. Show what that slant would be. What is the slant for the 9 feet—how much slant is it in a distance of 9 feet?

A. There would be 3 feet 10½ inches.

Q. In other words there is a slant of three feet 10½ inches in 9 feet—the pipe being 9 feet long?

A. Yes, sir.

Q. In other words, the top of the spout would slant towards the railroad track 3 feet 10½ inches nearer than the lower end?

A. Yes, sir.

Q. The incline toward the track would be 3 feet 10½ inches out of a length of 9 feet?

A. Yes, sir.

Q. Did you observe this spout there prior to the time Mr. McDade was killed?

A. Yes, sir.
Q. Did you see — frequently or infrequently?
A. Yes, sir; I saw it every day.
Q. About what was the angle of that spout as it hung when the weights rested on the platform—prior to the death of Mr. McDade?
A. That would be guesswork; I never took the measurements.
Q. To the best of your knowledge?
A. About an angle of 40 or 45. I couldn't tell. I am just guessing at that. I never took the measurement.
Q. But the measurements which you have given—there is no guesswork in that? You took them yourself with Mr. Young?
A. Yes, sir; I took them.
Q. How did those weights rest there—the weights attached to the chains which connected with the spout?
A. They rested on the platform.
Q. Two weights?
A. Yes, sir.
Q. Do you know where the body of Mr. McDade was found?
A. I just saw the pool of blood there.
Q. Where was this pool of blood?
A. Where was this pool of blood?
A. West of the tank about 22½ or 23 rails. They are 30-foot rails.
Q. Where was the pool with reference to the track which passes by the water tank?
93 A. The pool was north of the track, on the north side.
Q. How far from it?
A. Right near the track.
Q. Beyond the cross-ties?
A. Oh, yes, sir; between the passage switch which is about a half mile long and the main track.
Q. When did you see this pool of blood there?
A. It was several days afterwards.
Q. Did you examine the surface of the ground there?
A. No, sir; not particular.
Q. You saw the surface of the ground?
A. Yes, sir.
Q. Around the place where this pool was, what was the character of the surface?
A. It was smooth.
Q. Any rocks there?
A. No, sir; no rocks.
Q. Did you examine the ends of the cross-ties of this passing track? State if you saw any blood anywhere except at this pool?
A. No, sir; I never took occasion to look. Never look for any.

Cross-examination:

Q. As I understand, Mr. Walker, the spout is a straight piece of galvanized iron, or a circular piece of galvanized iron, and at the end of the spout there is a goose-neck?
A. The pipe is crooked at the end; yes, sir.
Q. Say that here is the track of the Choctaw, the spout is on the

north side of the track and the end of the spout hung over something like that?

A. Yes, sir.

Q. You measured from the end of this—the top of the spout—down to the track?

A. Yes, sir.

Q. That is, you dropped a line from the top of this to the track and measured from that point to the rail?

A. Yes, sir.

Q. Now, this spout, how high was that, do you remember?

A. It was 19 feet.

Q. Of course that was the nearest point to the track—was it not?

A. Yes, sir.

Q. And, in your calculation, of course you subtracted the nearest from the far-est to get the slant?

A. Yes, sir.

94 Q. In measuring, I believe you stated the bottom of the spout was about 14 inches?

A. Something near that.

Q. When you dropped the line from the bottom of the sway pipe, did you drop it from the outside of it?

A. Yes, we dropped it from the goose-neck.

Q. Did you drop the line from the outside of the sway pipe or inside—the side nearest the track or the side farthest away? Here is the way the spout goes out. Here is the supply pipe coming in here like my knife. Did you measure from the outside of the supply pipe or from the inside? Suppose the spout was in that condition. Did you measure from the outside or the inside?

A. We measured from the end of this right here.

Q. The pipe was up, there that way. Where did you drop the line? From the outside here or the inside?

A. We did not measure it from here at all. We measured from this piece right here.

Q. You say that you did not measure from the sway pipe at all?

A. No, from the end of the supply pipe.

Judge HAMMOND: "He measured from the stationary pipe."

A. The sway pipe is higher than the other pipe?

Q. Then you measured from (to put it in another way) what might be called the side of the sway pipe that was farthest away from the track?

A. No, sir.

Q. The end of the supply spout touches or very nearly touches the inside of the sway spout, did it not?

A. When the pipe goes up, the way we measured it, the sway pipe goes back as far as the supply pipe. That would be the nearest side to the track.

Q. You measured then the nearer side to the track?

A. Yes, sir, and the farther side would — beyond it.

Re-examination:

Q. This line that you dropped perpendicularly from the supply pipe—that is the stationary pipe that goes into the tank—by the end of that pipe nearest the track you mean the end that goes up against the sway pipe?

A. Yes, sir.

Q. The other end of that supply pipe is in the tank, isn't it?

A. Yes, sir.

Recross-examination:

Q. I understand you measured from down here to the
95 ground on this side of the pipe. Here is the supply pipe underneath here. You measured from a pipe that touches the inside of the supply pipe? (Illustrating with paper and pencil.)

A. I measured from this end right here.

Q. Does this rest on there?

A. No, sir.

Q. Does the supply pipe come to the edge of that?

A. No, sir.

Q. Does it go clean across?

A. Yes, sir.

Q. And you measured from the end of the supply pipe here?

A. Yes, sir.

Q. Then, from the goose-neck on top?

A. Yes, sir, measured the length of the pipe all the way across the bend.

Judge HAMMOND: "How much of a goose-neck is there?"

A. About 10 or twelve inches or a little more. The crook is that or a little more. We followed the crook all the way around.

Q. Did you make any memorandum of this at the time of these measurements?

A. Yes, sir.

Q. But you are now testifying from your memory of them, are you not?

A. Yes, sir.

Re-examination:

Q. You know that those measurements are correct?

A. Yes, sir.

And further saith not.

The deposition of W. D. Kennedy was next offered in evidence on behalf of plaintiff and read to the jury, defendant's counsel objecting to question therein as follows:

Page 95. "Now from the way the lantern was moving at the time you saw him give the signal, what was your best impression at that time as to his position on that car?"

Said question and answer thereto were objected to by Mr. Wright and objection overruled by the court. Defendant excepted to the ruling of the court.

96 Page 96. "State whether or not he properly discharged his duty in passing the signal at this time?"

Said question and answer, thereto, objected to by Mr. Wright, and objection overruled by the court, defendant excepting.

The court, upon the objection of defendant, excludes that portion of the answer to the last question on page 100, beginning with—"I remember full well, etc." And to action of the court in thus excluding same plaintiff excepted.

And to the next question—"Whenever you pass the tank and see the water-spout, you would naturally think of Mr. McDade?"

Mr. Wright also objected, which objection the court sustained. And to the ruling of the court plaintiff excepted.

Page 101, and to the question "State what effect the knowledge that signals may be given to him has upon his state of mind."

Mr. Wright also objected, said objection being sustained by the court. And counsel for plaintiff agreed that said question and the answer thereto might be withdrawn.

Page 105. The four questions on page 105 and the answers thereto, were withdrawn.

Page 105. The last question on page 105 and the answers thereto, were withdrawn.

And W. D. KENNEDY, being duly sworn, next deposed as follows:

Direct examination by Mr. FITZHUGH:

Q. Mr. Kennedy, state your age, residence and occupation?

A. Age 26 years; brakeman Choctaw, Oklahoma & Gulf R. R.

Q. How long have you been employed as a brakeman by the Choctaw, Oklahoma & Gulf R. R.?

A. From February, 1900, up to the present date.

Q. On what division of the road have you been working?

A. Known as the Memphis division.

Q. You have been on that division all along since your connection with them in February last?

A. Yes, sir.

Q. What is the Memphis division?

97 A. Little Rock to Memphis.

Q. Were you acquainted with Mr. John I. McDade?

A. Yes, sir.

Q. How long had you known him up to the time of his death?

A. Well, I knew Mr. McDade and he knew me. We were not speaking acquaintances at all when he was with the Illinois Central some three years ago. When we went to work for the Choctaw, I formed his acquaintance and made mention of the fact that I had seen him in Memphis before and he said yes, he had seen me. We had been braking together on this road for eight or ten round trips I guess. I knew him previous to that when he was working on the west end.

Q. Prior to this death he had made only eight or nine round trips on the Memphis division?

A. Yes, what trips he made on the Memphis division he made on this car I am on now. I am on the same car I have been on.

Q. In other words, the only trips he made on the Memphis division was as a member of the same crew you belonged to and the same caboose?

A. Yes, sir.

Q. Who was the conductor on that train at the time of the accident?

A. He was braking for C. A. Hollowell all this time.

Q. When did you last see Mr. John I. McDade alive?

A. While going from Hopefield to Edmondson I was with him. I went on the top of the train and we sat side by side from Hopefield to Edmondson. After we left Edmondson, I was braking behind and he ahead. They did their work at Forrest City and this passenger train was pretty close to us and I stayed back behind and Mr. Hollowell was telling me he was alright when we left Forrest City.

Q. State what signals you received from him up to the time that train reached Goodwin that night of August 19th.

A. Leaving Forrest City I passed what is known as the go-ahead signal—the high-ball—when we left Forrest City. Passing through Palestine I did the same thing. That is the next station to Forrest City going west. Went through Palestine, passed the signals there and kept on until we got to Goodwin. That was the next passing track—where we could get out of the way of a passenger train we met a Goodwin, and the engineer whistled and I watched to know what we were going to do, and Mr. Hollowell gave the go-
98 ahead signal. I caught the signal from him and passed it to McDade and McDade passed the signal. They have a whistling board half a mile from the station—it is marked on there—a big white board—and I suppose that he whistled there, there or a little piece on the other side, I am not sure, and McDade gave the signal there.

Q. Mr. Kennedy, you say that there is a sign-board to designate the point at which the engineer shall whistle just about a fourth of a mile this side of Goodwin?

A. Half a mile. I don't know whether he whistled a quarter or a half. He is supposed to whistle at this sign-board.

Q. How long after the whistle before Mr. Hollowell gave the go-ahead signal?

A. Immediately after he quit whistling.

Q. How far did the train move during the time the engineer was giving the whistle and before Mr. Hollowell finished giving his signal?

A. Well, about three seconds duration and then the signals were passed.

Q. After Mr. Hollowell gave his signal, who took it up?

A. I took it up. Then Mr. McDade.

Q. Now, as to the position of Mr. Hollowell, the conductor, yourself and Mr. McDade, at the time this go-ahead signal was being given, after the train whistled for Goodwin.

A. Well, I was in the caboose before we got to Goodwin and it is

customary—well, it is a rule—that we are supposed to be out on top, passing through all stations. Before he whistled, I entered the cupola window on my side and went out on top and got out on top and when he whistled I looked back. Hollowell raised his lamp and gave the signal. I raised my lamp and gave the signal and McDade did the same. As soon as that whistle stopped we began to give the signal and then went through Goodwin.

Q. Were you on the caboose?

A. I was about the third car from the caboose.

Q. At the time you received and gave the signal?

A. I was on about the third car from the caboose.

Q. Where was Mr. McDade at this time?

A. That I can't say. He was about ten cars from the head end I think. Mr. Hollowell was in the caboose, I was on the third car and Mr. McDade about the 10th car from the head end—from the engine.

Q. What was Mr. McDade's position on this car at the time he was giving this go-ahead signal?

99 A. That I don't know.

Q. Did you see his lantern moving?

A. Yes, sir.

Q. Where was the lantern?

A. The lantern seemed to be moving on the side of the car, he seemed to be giving the signals on the side of the car.

Q. Which side of the car?

A. Right-hand side.

Q. Now from the way the lantern was moving at the time you saw him giving the signal, what was your best impression at that time as to his position on that car?

A. Well, now, I will tell you. It was a warm night, a night—in other words—that wasn't hard on the brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than it is standing.

Q. You say that he was on the right-hand side of this car, and it was going toward Goodwin or Brinkley?

A. Going through Goodwin and towards Brinkley.

Q. On what side of the train was the engineer?

A. He is on the right-hand side.

Q. What is the proper position, Mr. Kennedy, for Mr. McDade to be in at that time, in order to best give the signal to the engineer?

A. He is supposed to give the signal on the engineer's side. It is customary to give it on that side, although the fireman is supposed to look out too, but he gave the signal on the engineer's side.

Q. Is that the right side on which to give it or not?

A. The right side.

Q. For whom was the signal intended?

A. It was intended for him—the one I gave—but, if the engineer didn't see his he could accept mine or Mr. Hollowell's, so that he saw the signal.

Q. You gave the signal to go ahead to Mr. McDade?

A. We passed signals properly.

Q. To the engineer?

A. Yes, sir.

Q. State whether or not he properly discharged his duty in passing the signal at this time.

A. He did discharge his duty properly.

Q. What was the last exchange of signals between you and Mr. John I. McDade?

A. At Goodwin station.

Q. By Goodwin station you mean the water tank there, do you not?

100 A. It is known as Goodwin tank.

Q. How fast was this train moving that night as it passed Goodwin?

A. Well, we were going about 20 or 25 miles an hour, somewhere along there.

Q. About 20 or 25?

A. Yes, sir.

Q. What orders, if any, had you received in regard to passing the passenger train that night?

A. I had received none.

Q. Did you know of any having been given?

A. Well, I knew we were ahead of the passenger train but regarding the orders Mr. Hollowell hadn't shown them to me, and it is customary, if the conductor receives any orders from the chief dispatcher—that is headquarters—he will give them to the head brakeman and the head brakeman will take them over and give them to the engineer. I was braking behind, and after everything is settled and we are gone, usually the conductor will give the orders to the hind man and let him read them over. That night I had seen no orders, but, as a rule, Mr. Hollowell shows his orders to the hind man.

Q. State whether or not the train was going faster or slower than usual that night.

A. About usual. The same rate of speed.

Q. Is 25 miles an hour the regular speed?

A. Yes, sir, we are supposed to go about that.

Q. Supposed to go about 25 miles an hour?

A. We are allowed 20 or 25—not to exceed 25. It is a card stipulation, not to exceed 25.

Q. Now, what was the condition of the track for two or 300 yards on each side of the Goodwin tank?

A. Well, I never have inspected the track along there, Mr. Fitzhugh. I don't know but what everything was all right. We go over it and haven't had any slow orders over it.

Q. I mean as to the surface.

A. Very level. In other words, it is known as the floor track.

Q. It is smooth and in good condition all along there?

A. Yes, but I think I know what you are trying to drive at—there are two tracks there—the long track and the house track. There are frogs on each side of them. Otherwise, the track seemed

to be all right. Cars will naturally rock at any point—you can take the heaviest piece of steel.

Q. What is the vibration of the car laterally? I mean by that, how far does the natural motion of the car carry or swerve it from perpendicular lines?

101 A. That is owing altogether to the side bearings of a car. If they fit close and snug, there won't be much. If they are loose, they vary according to conditions. You can't say positively how a car will vibrate—they have so many in the train.

Q. State whether or not it depends on the speed of the train to some extent?

A. Not at that rate of speed, there ought not to be any variation except as I say. If the side bearings fit close and snug, there won't be much, but if they have much play, they swerve more.

Q. You stated, I believe, that it was customary with brakemen to sit on the side of the car on the engineer's side?

A. Yes, sir.

Q. How many furniture cars were in this train on the night of August 19, 1900?

A. Well, I refer to Mr. Hollowell for that. I know there was one to my certain knowledge. The number of that car was I. C. No. 28149—furniture.

Q. What is the height of furniture cars of that type?

A. Some claim they are 14 feet. Seems to me they vary considerably. I don't know. I have never measured any of them. It gives the height of a car on the side of the car, that is, dimensions on the inside. The outside I am not positive about, because I don't know. I only measure them by the eye.

Q. How much higher are they than the standard, ordinary freight car?

A. You can take some and they are a foot and a half higher than the ordinary car.

Q. How much wider, if any, are they than the ordinary freight car?

A. Well, that is hard to say. As I tell you, they vary.

Q. Were many of these furniture cars handled on the Choctaw road?

A. Yes, sir; I suppose as many as any other road of its capacity.

Q. During the 9 or 10 trips which you say your crew, of which Mr. McDade was a member, made from the time he went on the Memphis division, up to the time of his death, could you state whether there were any furniture cars in any trains on which you made these trips?

A. Previous to his death I could not say. I will have to refer to Mr. Hollowell for that. We handle so many different kinds of cars I don't recollect.

Q. Mr. Kennedy, where there are furniture cars in a freight train such as you had that night, what is the best position for a

102 brakeman to be in, in order to successfully give the signal to the engineer?

A. The best position is to give it on the side of the car so it can

be seen very distinctly. He can be sitting on the side of the car, or standing on the side of the car there is no special position to be in. I can stand up and give it as well as I can sit down and give it, and it doesn't make any difference so he gets it. You have to give it on his side and you have to reach out on the side of the car to give it so it will be seen.

Q. Suppose between the brakeman and the engineer there are some of these furniture cars intervening in the train?

A. Well, it will be necessary to lean out, if you know that.

Q. You have to lean out further then in order to keep the furniture car from obstructing your view?

A. Yes, sir, you try to; you try to give it as plain as possible. A man should.

Q. Mr. Kennedy, were you familiar with this Goodwin water tank at the time of the death of Mr. McDade?

A. I suppose so, as much as any of the rest of them. I am the oldest brakeman on the east end.

Q. At what angle was this water-spout hanging with reference to the tank prior to the death of Mr. McDade on August 19, 1900?

A. I can't say. I have never been hit there. I have always tried to guard against such things.

Q. How did you guard against it.

A. Standing in the middle of the car.

Q. That was about the only way to guard against it?

A. I have passed there sitting on the side of the car.

Q. By doing what?

A. By sitting still.

Q. Didn't you start to illustrate then by showing that you took your hand——

A. No, sir; I have passed there on the side of the car. I will say this, though, as I say, I never was hit by one and don't want to be. I never was hit by one. I have seen them hanging a little out of place. They would not be thrown back properly.

Q. Did you ever pass this one at Goodwin while sitting on a furniture car?

A. I can't say that I ever have.

Q. How high above the edge of the furniture car—the top edge—nearest to the water-spout, would it hang usually?

A. To strike a man?

103 Q. No, how high would it hang above the edge of the car?

A. This furniture car, well, I have never measured. This tank will clear a man on an ordinary car and on a furniture he would have to look out for the chains hanging down. I don't know that it will hit a man or not. It hangs low and if not in its proper place it is liable to hit you, but I never have tried on a furniture car. That is, I have never noticed it, never paid any particular attention to it.

Q. What is the proper position of the water-spout when not in use?

A. They are supposed to hang clear a car.

Q. How near the tank are they supposed to hang? How near a perpendicular line?

A. For instance, that is the tank and that is the spout, the spout is supposed to hang that way.

Q. Can you give about the angle?

A. That is about it—to play just that way. I am not positive about it. I fully understand what you mean, but at the same time I would not know what to say, on what angle that would stand.

Q. Had you noticed this water-spout particularly before this accident?

A. Yes, sir; I have noticed them all.

Q. Had you noticed this one particularly?

A. I can't say that I did.

Q. Have you noticed it any more since the accident?

A. Well, we pull up there, and pulling by there we usually take water there and always coming this way I would look out for that, that is about all. I remember full well that is why we lost McDade at Goodwin, Mr. McDade treated me, on our short acquaintance, you might say, as well as any man could treat another, and we were, you might say, friends, and that is why every time we go to Goodwin, I think of Mr. McDade.

Q. Whenever you pass the tank and see the water-spout, you would naturally think of Mr. McDade?

A. Yes, sir.

Q. Mr. Kennedy, what are the duties of a brakeman while the train is in motion, and under orders like it was the night passing Goodwin?

A. Well, circumstances vary. The brakeman is supposed to ride out on top passing through all stations. The brakeman is supposed, when we stop, to look his train over to see that there is no break, no rigging hanging down, no bursted air-hose, and obey instructions from the conductor. He is supposed, in passing stations, to pass signals.

104 Q. State what effect the knowledge that signals may be given to him has upon his state of mind.

A. He is supposed to look out for signals until he is satisfied that everything is all right.

Q. State whether or not the engineer responds to the signals given by the brakeman.

A. The engineer invariably does.

Q. This night, when you passed the go-ahead signal to McDade, and he passed it to the engineer, what did the engineer do?

A. He kept going.

Q. State whether or not he answered it in any way by any signal.

A. He is supposed to answer it by two short whistles. I think he answered it that night. I am pretty sure he answered it, because he kept going. If he hadn't gotten the signal, he would have stopped.

Q. Is the brakeman supposed to continue to give these signals until he receives a reply from the engineer?

A. Yes, sir.

Q. What was Mr. McDade's height?

A. About six feet, I suppose.

Q. Now, Mr. Kennedy, assuming that Mr. McDade was sitting erect on the right side on the edge of the furniture car in the train as it passed Goodwin the night of August 19, 1900. What would be the result, if that water-spout was hanging as you had seen it hang prior to that time?

A. Well, Mr. Fitzhugh, I can't say that the spout hit Mr. McDade. I don't know whether he was hit or whether he fell off. That I can't say.

Q. You don't understand. What would be the height of Mr. McDade's chin above the top of a furniture car, if he was sitting erect on the side thereof?

A. If he was on top his chin would be two or three feet above it. The car is supposed to be not exactly level. It slants this way and the body is upright. His chin would be about that far above the top of the car.

Q. How far would the water-spout hang over the edge of that furniture car as it passed?

A. It should hang, in its right position, the mouth of it not quite the middle of the car. I can better illustrate that to you if you will give me a piece of paper.

Witness here makes a drawing which is attached as Exhibit "A" to his deposition.

Q. I understood you to say a little while ago that the water-spout hung about 18 inches to 2 feet over.

A. No, sir, I didn't give the length at all. I don't
105 know what angle it is supposed to hang. It is supposed to hang so as to clear a man on the car.

Q. On an ordinary freight car?

A. Yes, sir, on an ordinary freight car. I don't know whether I have been on a furniture car under them or not. I know I have never been hit, and I know I guard against all such things.

Q. What was Mr. McDade's character, so far as his habits were concerned as a railroad man?

A. Well, Mr. McDade, as far as I know, and I was associated with him from the time we went to work over there, his habits were the best—as well as could be expected of any man at all.

Q. How was he regarded by his associates and co-employés with reference to his efficiency and carefulness and prudence or the reverse?

A. From what I can understand, Mr. McDade was liked as well as any of them, if not better than most of them. He was regarded as a competent employé, and his habits were the best to my knowledge, and I was with him quite a good deal.

Q. State whether or not you had ample opportunity to judge of his efficiency and character.

A. Yes, sir, I think I did.

Q. You have filed here with your deposition, marked as Exhibit "A," a rough drawing showing a tank and water-spout and car. State what character of car this was intended to represent.

A. Well, any car. That is supposed to hang clear any. A furniture will go under those spouts as well as any, but the distance I don't know.

Q. State what you said a moment ago as to whether this drawing was an ordinary car or a furniture car.

A. That is drawn to show you how that spout should hang from any car.

Q. You didn't intend to represent this as the exact position of the spout or the tank at Goodwin?

A. Not at the time we passed through there. I don't know. I am trying to give you an illustration how it should hang.

Q. Didn't you state that the mouth of the spout would be about above the center of the car?

A. Not exactly the center. Here is the center of the car. About a quarter.

Q. The mouth of the water-spout hangs over the car about half way between the center and the edge of it. How far above the edge of an ordinary freight car does this water-spout at the Goodwin tank hang?

A. I have passed under that and cleared it.

106 Q. What is your height?

A. I am 5 feet 7.

Q. When you were sitting on an ordinary freight car?

A. I will pass under those spout- and clear.

Q. When you are sitting on an ordinary freight car on the edge on the right side, how far above your head, when you are sitting in an upright position, will this water-spout at the Goodwin tank hang?

A. I don't know the exact distance. I know I have cleared them, passed right under them. The only way I have ever observed them was just to glance at them.

Q. How far above your head?

A. I don't know whether it is 6 inches or 8 inches or ten inches, maybe a foot and a half. I won't say positively, because I won't do it. I don't know.

Q. To the best of your judgment, Mr. Kennedy, state whether or not it is as much as a foot under those circumstances.

A. It is just as I told you a while ago. I am trying to give you a fair and impartial answer to your question.

Q. You think it may be——

A. From six to twenty. You can judge by your eye as to a particular distance.

Q. While sitting on the right-hand side of a car going towards Brinkley——

A. I was sitting in the middle of the car that night.

Q. State whether you have ever passed under this spout without bending your head.

A. Yes, I have passed under Goodwin spout without bending my head.

Q. Then how far did the spout miss it when you were not bending your head?

A. I have just told you a while ago.

Q. From 6 to 20 inches?

A. Yes, sir, I have passed under it. Still, I watch out for them. I take a glance at all of them. I would be foolish if I didn't. I am liable to go the same way he did. I have come pretty near going too.

Q. On the Choctaw?

A. On the Ft. Scott and the K. C. M. & B. too.

Q. How did you come near——

A. Came pretty near falling off. When I was a student I worked on the Ft. Scott and Memphis road. I came pretty near getting caught by one of those overhead drew-bridges. This happened to drop down and they "hollered" to me in time and I had just time to drop. That put me on my guard for good and for all obstructions.

107 Q. State how this water-spout at the Goodwin tank hangs now with reference to its position before this accident.

A. It will clear you now all right—good and clear.

Q. Then there is a difference in its position now and its position before the accident?

A. I don't know whether they moved this tank or not. I didn't see them move it.

Q. Just state the difference in its position now and before.

A. It will clear you, that is all I know.

Q. State whether or not there is any difference in its position now and before the accident.

A. I don't know. It will clear you fully. I don't know the difference. I can't say what the difference is. There is so very little difference, if there was any, that you would hardly notice it.

(Last 4 questions were withdrawn.)

Q. What has been your observation with reference to the change if any, in the position of the water tank?

A. Mr. Fitzhugh, I don't know of any. It will clear you all right now. I never have lost a trip only on account of a little sickness and never worked on any other end. I have to pass it every trip.

Q. State whether the water-spouts on the water tanks between Little Rock and Memphis hung practically at the same angle.

A. Well, they are bound to clear all trains. To the best of my knowledge it is a standard tank. I mean by standard tanks built and used on what roads I have been on and what roads I have seen.

Q. Generally throughout the United States?

A. Yes, sir. I suppose so. The Iron Mt., Union Pacific, Fort Scott and K. C. roads.

Q. State whether or not you have observed tanks on other roads where the spout hung practically perpendicular against the tank.

A. Well, you can take these spouts and push them up.

Q. State whether you have observed them.

A. Well, if a spout is hanging anyway low at all, you will observe it.

Q. If you will answer my question I will be much obliged.

Whether on other roads you have noticed the spout hanging almost perpendicular against the pipe.

A. Well, they hang both ways. They hang just this way—so a fireman can get hold of them and take water.

Q. What do you mean by both ways?

A. Hang against the tank or at an angle.

Q. How do they hang on the Choctaw road? Against the tank?

108 A. No, sir, they hang as I gave you an illustration, right there.

Q. Are all of them built the same way as the one at Goodwin?

A. Yes, sir.

Q. Do you think this Exhibit "A" to your deposition fairly represents the position of this water-spout with reference to the tank?

A. I do.

Q. So that the water-spout, according to your best knowledge and belief, lays right out at an angle from the tank, does it?

A. Supposed to lay that way all the time.

Q. Now, Mr. Kennedy, to refresh your memory, don't you know that the water-spout is built out on a frame several feet from a tank?

A. Yes, sir.

Q. Then this Exhibit "A" doesn't fairly represent that, does it?

A. No, it don't. What I was trying to drive at is this: I wasn't trying to get this part of it. The body of the tank won't bother you any time. It is the spout you were asking about, and that is the way they hang over. I knew they hang on a frame.

Q. Do all of them hang on a frame on the Choctaw road or not?

A. Yes, sir.

Q. The frame is the same distance from the tank?

A. They seem to be. I will give you a better drawing than that of the tank. I would rather that point be cleared. I knew what I was driving at all the time. It was this right here. I know they have that and I could give it to you and let it go in positive in my deposition.

Q. When did you first miss Mr. John McDade on the night of August 19th?

A. At Brinkley.

Q. What did you do when you missed him?

A. Reported the fact to Mr. Hollowell.

Q. The conductor?

A. Yes, sir.

Q. What did you do after that?

A. I went ahead with my work. I was working at the time and with his (meaning Hollowell's) assistance finished the work.

Q. State whether or not you made any search for him, and if so, what was the result?

A. Yes, sir. I didn't go as far as Mr. Hollowell though.

Q. State all you know.

109 A. I instituted search for him, called for him, we had three or four empty cars in the train, and I went to them immedi-

ately and "hollered" for him and didn't get any reply. I looked up on the car and saw his lamp on this car.

Q. Which car?

A. The furniture car.

Q. Where was his lantern?

A. On the hand-hold above the car burning.

Q. How far from the side of the car and from the end of it?

A. Well, the I. C. built their cars with the hand-hold on top that way. Then they have a place bent in there that you can set your lamp in to keep it from falling off. His lamp was right in there. That is where I found his lamp. I removed his lamp.

Q. On what side of the car was it going towards Brinkley?

A. On the right-hand side of the car, on the engineer's side.

Q. State whether or not the lantern was in the proper position—just where it would have been if he had been sitting on the side of the car.

A. Well, sometimes they have those places there and a man will set his lamp down behind him. I set mine down behind me.

Q. What is the place made for on the car?

A. If you want to put your lamp there it is made for that purpose.

Q. It is made for that purpose?

A. I use it for that.

Q. Do you know that it is made for that?

A. I judge it is, because a lamp will fit there. There is no other cause for it. You set your lamp in there and no matter how fast you are going you won't lose your lamp.

Q. What is the duty of a brakeman with reference to his lantern?

A. To keep it lit and in a place to use it.

Q. Keep it right by his side?

A. Yes, sir.

Q. Or in his hand when giving signals?

A. Yes, sir.

Q. Suppose a brakeman goes from one car to another—what does he do?

A. Takes his lamp with him, if it is dark enough.

Q. If he has occasion to go down the ladder to make some observation——

A. If it is night, he will take his lamp with him.

110 Q. Have you seen Mr. Kilpatrick out at Goodwin since the accident?

A. I have not. The only time I saw Mr. Kilpatrick and the first time I ever saw him to know him he was in his office at Little Rock, and I saw him here in Memphis at Judge Wright's office.

Q. State whether or not you made a report of this accident immediately after it happened.

A. I did, sir. We have a form for that purpose.

Q. Have you any objection to filing a copy of that report as an exhibit to your deposition?

A. I have turned it over to the company.

Q. Will you file a copy of it?

A. If you get my report that is turned in.
Q. You have no objection to filing it, have you?
A. None in the world. I have tried to be fair and square on both sides, and don't think my testimony in regard to these depositions vary at all. I think you have asked a sight more questions than any of them.

Cross-examination waived.

Mr. OSCIE WALKER, being duly sworn, next testifies as follows:

Direct examination:

Q. Where do you live, Mr. Walker?
A. At Goodwin, Ark.
Q. How long have you been living at Goodwin?
A. Seventeen years.
Q. Do you know the railroad water tank there?
A. Yes, sir.
Q. How long have you known that tank?
A. I guess seventeen years. Since I was three years old.
Q. What is your business in Goodwin?
A. Clerking in a store.
Q. What store?
A. J. T. Dias & Co.
Q. How far is this tank from J. T. Dias & Company's store?
A. About 125 yards.
Q. State whether or not you observed this tank and water-spout there prior to August, 1900.
A. Yes, sir, I did.
Q. Do you remember the time that Mr. McDade was killed there at Goodwin?
A. I remember the time there was a man killed.
111 Q. A brakeman?
A. Yes, sir.
Q. When was that to the best of your knowledge?
A. August.
Q. Last August?
A. I couldn't say. I remember it was the month of August.
Q. Do you remember seeing this tank shortly prior to this accident?
A. Yes, sir, I saw it every day I was there.
Q. How did the water-spout hang there with reference to the upright on which the pulleys and chains were attached?
A. Well, I should say it would hang at an angle of about forty degrees.
Q. And inclined which way?
A. Southward.
Q. Towards the track?
A. Yes, sir.
Q. Mr. Walker, was there any chain attached to this spout—any chain hanging beneath it?

A. Yes, sir, a chain about 2½ or 3 feet.

Q. Please state whether or not you ever had your attention attracted to the matter of the distance that this spout, when hanging in the position in which it hung, would be from the train passing under it, freight cars.

A. It would be something less *that* the height of a man—an average man.

To this last answer counsel for defendant objected.

Judge HAMMOND: "That is the witness' way of answering the question."

Question withdrawn by the plaintiff's counsel

Q. State whether you ever had your attention attracted to this chain coming in contact with the cars passing under it?

A. Yes, sir.

Q. What was the fact in regard to that?

A. Well, the car would strike the chain and where I worked you could hear the chain rattle, hear it strike and see it swing backward and forward.

Q. Drag on the cars—ordinary freight cars?

A. Yes, sir.

Q. You have seen then yourself?

A. Yes, sir.

Q. You say this chain is about 2½ or 3 feet?

A. Yes, sir.

Q. How far from the end of the pipe is this chain attached to this spout?

A. I think it is near the large of the pipe.

112 Q. Then the spout would come within less than 2½ or 3 feet of a passing train, would it not?

Objected to by Mr. Wright and withdrawn by Mr. Fitzhugh.

Q. You say this chain was 2½ or 3 feet and would drag on the cars?

A. It would strike. More than once I called the attention of those people to the fact.

Mr. Wright objected to the latter part of Mr. Walker's answer, said objection being sustained by Judge Hammond.

Q. Did you see it strike on the top of the car?

A. It would strike the edge—the car would strike it—I was on the opposite side.

Judge HAMMOND: "How large a chain was that?"

A. "A chain about half an inch. I don't think it is as large as a trace chain. It is used for pulling the spout down. It had about a three or four inch ring in the end."

Q. The whole thing was 2½ or 3 feet in length?

A. Yes, sir.

Q. Did you hear of the killing of this brakeman in August as you have stated?

A. Yes, sir.

Q. State whether or not you had any occasion to make any investigation there with reference to the place where the body had been found?

A. Like other people's curiosity, I went up to see the spot.

Q. What day of the week was this?

A. Monday.

Q. How long after the accident?

A. It was Sunday afternoon, and the accident happened at night.

Q. What day?

A. I know it was Sunday.

Mr. WRIGHT: "You went there next day?"

A. "Yes, sir."

Q. It was the same day, wasn't it?

A. Yes, the man was found that morning.

Q. It happened early in the morning and it was during that day you went there?

A. Yes, sir.

Q. What did you find? What developed?

A. A pool of blood.

Q. Where was the pool of blood?

A. About center between the main track and the siding.

Q. About center between the two?

A. Yes, sir.

113 Q. What was the character of the surface of the ground?

A. It was smooth.

Q. Any rocks or rough surface there at all?

A. No rocks there.

Q. It was a smooth surface?

A. Yes, sir; it was smooth.

Q. Mr. Walker, did you make any examination further than to look at this pool of blood? Did you make any examination of the ends of the cross-ties?

A. I looked along to see what he struck.

To this answer Mr. Wright objected and the court overruled said objection, to which ruling defendant excepted.

A. I looked along the ends of the ties to see—I thought perhaps he might have been drug.

Mr. Wright objected to witness using the word "perhaps," which objection the court overruled, and to the ruling of the court defendant duly excepted.

Q. State what you did.

A. I went down the railroad towards the water tank about 50 yards noticing all along.

Q. Did you notice the ends of the cross-ties?

A. Yes, sir; all along,

Q. Fifty yards towards the tank?

A. Yes, sir.

Q. Did you make any examination beyond west of the place where the pool was?

A. No.

Q. In the immediate vicinity of this pool did you look at the cross-ties?

A. Yes, sir.

Q. State what evidences, if any, you found of blood or anything else to indicate that the cross-ties had been struck or anything of that kind.

To this question Mr. Wright objected, said objection being overruled by the court, and defendant excepted to said ruling.

Q. Describe what you saw?

A. Just a pool of blood and a few tracks.

Judge HAMMOND: "What kind of tracks?"

A. "People—just show tracks."

Q. Where?

A. Around the blood.

Q. When you made your examination, other people had been there—had they not?

A. Yes, sir.

Q. The ground was of what nature—such as to receive impressions of the feet?

114 A. Yes, sir.

Q. Do you know whether it had been raining shortly before this or not?

A. I don't know.

Q. Are there any frogs or switches in the vicinity of or near this pool?

A. Not near there—50 or 60 yards—I don't know the distance. I think it about the length of two telegraph poles—between two poles from the frog of the switch to where that blood was.

Q. You state you were examining all along there for the purpose of ascertaining whether there was any blood or other indications?

A. Yes, sir.

Cross-examination:

Q. You speak of having examined the chain or having observed the chain. When was that?

A. After they repaired the tank?

Q. I am not asking about that but the time you are speaking of as having seen the chain—the chain against the cars—has that been during the past seventeen years?

A. Yes, sir.

Q. You have noticed that for how long?

A. Since about April, I think, April, 1900.

Q. Had you observed it before 1900?

A. No, sir.

Q. You have just noticed it since April, 1900?

A. It didn't strike before that time.

Judge HAMMOND: "Perhaps the witness is speaking of repairing or building the tank before accident."

A. They repaired the tank in April before the accident occurred in August.

Q. What was the occasion of you observing it, Mr. Walker?
A. Just looking at the train passing and hearing the noise and seeing the chains move.
Q. You had no particular interest in the matter, did you?
A. No, sir.
Q. Did you have any occasion along at that time to measure the length of the chain?
A. No, sir.
Q. Just simply seeing the cars passing and repassing?
A. Yes, sir.
Q. Did you have occasion to notice what particular cars it struck or kind of cars?
A. No, sir.
115 Q. Do you know the length of this spout—this sway spout?
A. I think it is about nine feet, eight or nine.
Q. You do not undertake to give it accurately?
A. No, sir.
Q. Do you know who did measure it with Mr. Jordan?
A. I saw them out there.
Q. Was there a gentleman of your name?
A. Yes, sir.
Q. Is he a relative of yours?
A. A brother.
Q. Were you there?
A. I was at the store.
Q. You made no measurements yourself?
A. No, sir.
Q. And about what time of day was it that you went down to this spot where the body had been?
A. In the afternoon late.
Q. Late in the afternoon?
A. Not night, about 4 o'clock, I guess. It wasn't night, but was getting late.

And further saith not.

E. WESSENBERGER, being duly sworn, next testifies as follows:

Direct examination:

Q. What is your business?
A. Photographer.
Q. With what photographer are you connected?
A. Mr. Hanson.
Q. Please state whether or not the photographs in your hand and which are marked on the back were taken by you?
A. Yes, sir; these were taken by me.
Q. Are those correct photographs?
A. Yes, sir.
Q. What is that a photograph of—the one you first have?
A. This is a photograph of the Iron Mountain.
Q. Where is it located?

A. I couldn't tell you exactly, it is out in that direction.
Q. What is the other?
A. This is the Southern.
Q. How are they identified?
116 A. By the names on the back and I know them by looking at them.
Q. They are correct photographs?
A. Yes, sir.
Q. When were they taken by you?
A. January 14, 1901.
Q. State whether that photograph was also taken by you?
A. Yes, sir; that was taken by me.
Q. What is that a photograph of?
A. That is the Southern—made down this way—out in this direction.
Q. What tanks have you there?
A. I have two Southerns here.
Q. Was that tank of the K. C. road taken by you also?
A. I don't remember this one.
Q. That is a different road from the other two?
A. Yes, sir.

Cross-examination:

Q. How long have you been in the photograph busi—
A. Fourteen years.
Q. Your headquarters are in the city of Memphis?
—. ——.
Q. You are connected with that firm?
A. T. E. Hanson.
Q. Can you state any more definitely than you have to the jury where the first photograph to which I refer was taken?
A. It was the Iron Mountain—the one I made first—one in that direction.
Q. About how far?
A. It is a good ways out.
Q. A mile or a half mile?
A. A good ways out—the end of the city.
Q. A good ways out in that direction. Is that as near as you can tell us?
A. Yes, sir.
Q. No. 2 was taken in another direction, wasn't it?
A. It was made down here at the Southern depot.
Q. Where is that?
A. I couldn't tell you exactly. I am not well acquainted here.
Q. Have you been in Memphis fourteen years?
A. No, sir.
Q. How long?
A. About six months.
Q. Where are you from?
A. Clarksville, Tenn.

117 Q. Don't you know the names of the streets?
A. Some of them I do.
Q. You don't know the name of the street the Southern depot is on?
A. I take the east-end car to go there.
Q. Within the city limits?
A. I think it was. I couldn't tell you where the city limits are.
Q. You don't know how big the city is, do you?
A. No, sir; I haven't been around it all yet.
Q. There was a No. 3—where was that taken?
A. I can't tell you unless I look at the photograph.
Q. Another you say was taken in another direction?
A. This is the Iron Mountain. There are only two tanks out this way, and this is the Iron Mountain, and it is the farthest out.
Q. There might be another one a little further out?
A. No, sir; I think not. I went to the end.
Q. End of the Iron Mountain?
A. The end of the city.
Q. Where was it that you took the Iron Mountain—can you give the jury any idea of where that picture was taken on the Iron Mountain?
A. It was made there in the yards.
Q. In which direction was that?
A. South—in that direction.
Q. And in the yard, you say?
A. Yes, sir.
Q. You had your instrument, did you?
A. Yes, sir.
Q. Anybody with you?
A. Yes, sir.
Q. Who?
A. I couldn't tell the gentleman's name. He is a stranger to me.
Q. He wasn't connected with you in the business?
A. No, sir.
Q. Was he acquainted with the photograph business or art, do you know?
A. No, sir.
Q. He was showing you tanks?
A. He was. He showed me the tanks because I was a stranger and didn't know about them.
Q. How near did you get to it? How far were you from them?
A. I guess I was about 25 yards from this one.
Q. Were you in front or at the side or how did you take it?
118 A. I was right in the middle of the track that runs right by it.
Q. It was 25 yards from you?
A. About 25 yards.
Q. You were in the middle of the track? And was the tank on the side of the track?
A. Yes, sir.

Q. Where was your instrument located—on the ground? On the track and looking through at the usual height?

A. Yes, sir.

Q. How far were you from the ground—how far was your instrument?

A. About that far—about three. Something like that. Three or four feet.

Q. Were they all taken at about the same place—the same positions or relatively at the same angle?

A. All in the same position, right in the center of the track.

Q. Were you instructed to take them, directed to take them from the center of the track?

A. No, sir.

Q. How did you happen to get in the center of railroad track to take it, rather than on one side or the other?

A. It was just my idea, taking them that way.

Q. Did you get any side view?

A. No, sir; I didn't make no side view at all.

Q. Isn't that all you made?

A. No, it would have taken it all in, if it hadn't been for this house here.

Q. But it was just your own idea to get in the center of the track?

A. Yes, sir.

Q. Nobody told you to get there?

A. No, sir; no one told me anything.

Q. Did you get in the center of the track at every place you took them?

A. Yes, sir.

Q. About twenty-five yards away?

A. Yes, sir.

Q. Did any one suggest that you get twenty-five yards away?

A. No, sir; the camera will take that.

Q. You always take pictures at the same distance?

A. No, it depends on the size of the subject.

Q. This was a large subject or small?

A. Medium. If it had been a house, I would have gone further away. A large house.

119 Judge HAMMOND: "That is a matter of skill on the part of the photographer?"

A. "Yes, sir."

Q. This gentleman who was with you and whose name you do not know—he didn't suggest to you where to go?

A. No, sir; he didn't say a word.

Q. How did you happen to be with him?

A. Because I was a stranger. I didn't know where to go. Some one sent him to Mr. Hansom. I don't know who it was.

Q. He came down there and you went with him?

A. Yes, sir.

Judge HAMMOND: "It wasn't one of these lawyers, was it?"

A. "No, sir."

And further saith not.

It was agreed by counsel that the expectancy of the deceased, John I. McDade, was the number of years shown by the Carlisle table of mortality.

It was further agreed that the measurements of car No. 28,149—the inside measurements of the box, were 42 feet in length, 9 feet in width and 8 feet 8 inches in height, and that the total height of the car is either 14 feet or 14 feet 1 inch, that is, the furniture car on which plaintiff was injured.

And Dr. FRANK M. SMYTHE, being duly sworn, next testified:

Direct examination:

Q. What is your name?

A. Frank M. Smythe.

Q. What is your profession?

A. I am a physician and surgeon, but my practice is limited to surgery.

Q. How long have you been engaged in the practice of your profession?

A. I have been practicing outside of the hospital since '91.

Mr. WRIGHT: "I agree that Dr. Smythe is an expert physician and surgeon."

Q. Are you connected in the capacity of surgeon of any railroad in the city?

A. Yes, sir; we have charge of the surgical work of several roads in the city.

120 Q. Give the names?

A. The Tennessee Midland.

Q. Is that the N. C. & St. L.?

A. Yes, sir; and the Y. & M. V. R. R.

Q. You are partner of Dr. Rodgers?

A. Yes, sir; who is division surgeon of the I. C. system, but we are partners, and, of course, I do a great deal of the work. He is the division surgeon in charge of the work. I, as his partner, do a great deal of the work.

Q. Doctor, has your experience brought you in contact with and made you thoroughly familiar with injuries produced by blows and falls?

A. Well, rather. I should say so, yes, sir. I am surgeon of the hospital and professor of surgery, and have a great deal to do with that kind of business.

Q. Doctor, I will give you a hypothetical case. Assuming that a man 27 years of age, in good health, was riding on top of a freight car the height of which, at the point where he was sitting on the side and edge thereof, was between 13 and 14 feet from the ground. That the car was a part of a freight train which was *being* at the rate of between 20 and 25 miles per hour. That while sitting in this position on the side of the car, with his legs hanging down, the train running at this rate of speed, sufficiently near a water-spout consisting of an iron pipe about 9 feet long, and from 10 to 12 inches in diameter, or, say, 10 inches in diameter at the small end, this

pipe being in such a position with reference to the car on which the party was riding as that he could have come in contact with it, in such a position that it was possible for the pipe to have struck him on the head or face. That the train was going west, he was facing north, and that the structure consisted of a water tank from which this spout projected and was on the north side. That this train passed this structure to which I have referred about one o'clock at night. That about 3.05 of the same morning, or say between 3 and 4 o'clock of the same morning, the body of this man was found near the track on which this train had been running, between this main track on which this train had been running, and a passing track or spur track. That the surface of the ground where the body was found was of a smooth and level character; that there were cross-ties projecting from the passing or spur track; that there was a pool of blood about midway between this passing track and the track on which the car was running, and that there was no other evidence of blood in the immediate vicinity where his body was found. That on examination his ear to use a plain but
121 not, technical expression, was burst open or mashed, that liquid or blood exuded therefrom, that the jaw-bones were completely crushed, both sides of the jaws being completely crushed, that his teeth *was* practically knocked out, hanging on shreds of flesh, that there was a cut in the chin extending to the bone from the lip down. That he also had a scalp wound near the crown, a little to the right or center of the head, but the skull was not broken. That there was not much blood on his head. That there was a slight wound on the side of the head near the rear. That two of his fingers were broken and scratches on his hand. That there was blood on his shirt front and blood on his neck. What, in your opinion, Doctor, produced those injuries?

To the foregoing hypothetical question counsel for defendant excepted.

Judge HAMMOND: "I haven't any doubt but that Dr. Smythe would give an intelligent and satisfactory answer to that question, and if we did not already have a jury here competent to try it, I would be willing to submit that question to him and take his judgment. It seems to me you are submitting the very question the jury is to decide, and submitting it in its broadest and fullest sense as a question of fact to be determined by them. The jury are entitled, where the facts and circumstances involve a matter of special skill and science, to the opinion of experts in that art or science to aid them in making up their own judgment, but that principal cannot be extended to ask, under the disguise of an examination of an expert, to ask him to decide the question of fact involved in the case, and I think Mr. Fitzhugh's question is far to- elaborate in its array of all the facts in this case in relation to this injury, some of which have no relation whatever to medical skill and science, and he should confine his question to a presentation to Dr. Smythe of any question that may relate to these injuries in an anatomical or physical sense. The objection is sustained."

And to the ruling of the court, plaintiff duly excepted.

Q. Assuming Doctor, that a man has an injury on the side of his face, his ear was mashed and that there exuded from it some form of liquid, blood or other matter, that his jaw-bones was completely crushed, so that when you took hold of the jaw there you could determine that the bones were in that condition. That — was a cut in the chin from the lip down to the bone. That his teeth were very loose. That he had a scalp wound near the crown or a little to the center of the head, but the skull was not broken.
122 That there was not much blood on the head, that there was a left wound on the left side of the head near the ear, that did not amount to much; that the shirt was bloody in front and on his neck there was blood. Please state what, in your opinion, if you have a reasonable certain opinion in regard thereto, produced such injury, or a condition such as I have described.

Counsel for defendant objected to said question, which objection the court sustained. Plaintiff excepted to the ruling of the court.

Q. Doctor, assuming that the man was sitting on the side and edge of a car with his legs hanging over the side of the car, the car being between 13 and 14 feet high and being a part of a train which was running at a rate of speed, say between 20 and 25 miles per hour. That he was found on the side of the track on which the train was moving in the condition and with injuries such as I have described to you. Please state whether or not in your opinion, if you have an opinion of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on level ground.

Counsel for defendant objected to said question.

Judge HAMMOND: "I think the question is sufficiently fair, if Dr. Smythe remembers the condition described in previous question. The objection is overruled."

And to the ruling of the court defendant duly excepted.

A. It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible——

Mr. WRIGHT: "I object to what is possible."

A. I cannot be absolutely certain about it. I have an opinion.

Judge HAMMOND: "You don't think you can answer that?"

A. I can be reasonably certain. I have an idea about it, but, at the same time, it is possible that other conditions could enter into this same thing. I have had an experience with a case similar to this.

Judge HAMMOND: "It isn't proper to go into any specific cases."

Q. If you say that you can, with reasonable certainty give an opinion as to whether those injuries, such as I have described to you, could or not have been produced by falling—a falling from the car running at that rate of speed, under the conditions described, please give such opinion.
123 A. My opinion — that a single blow would not have produced such an extensive injury as you have described. That

is all I can say. My opinion is that a single blow could not have produced such an injury as you have described.

Q. Doctor, by what kind of instrument, in your opinion, was such an injury to the face and head produced?

A. Evidently a blunt instrument. It could not have been a pointed instrument or a sharp instrument. In my opinion, it was evidently a blunt instrument such as the ground or pipe.

Q. State whether such a condition, the breaking up of tissue such as I have described to you, would require a slight or powerful blow?

A. A very powerful blow. Those structures are bony and very compact, and it requires a great deal of physical force to produce such a destruction of the bony structures. Evidently a powerful blow to produce such a multiple of fractures. That is my experience with such accidents.

Q. Doctor, please state whether or not, in your opinion, falling from the side of the car on the ground, where the ground is of such a nature or surface as to receive impression of footprints—whether falling from the side of the car 13 or 14 feet in height would produce such injuries as that.

To this question counsel for defendant objected, the court overruling same, and to the ruling of the court the defendant duly excepted.

A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height going at the rate of speed coming in contact with the ground without some interruption from the fall. I can readily see how very extensive injury could result, but I cannot see how it would produce lesions and such things in one blow, but a man going at that rate and falling from that height, it would produce extensive injury.

Q. You say those injuries could not be produced by one single blow?

A. It is my opinion that such lesions and such injuries could not have been inflicted from one blow.

Q. And these injuries, in your opinion, were produced by a blunt instrument? Would a pipe, an iron pipe, 10 inches in diameter, if a person came in contact with it while the train was running 20 or 25 miles an hour, be such an instrument as would produce such injuries?

To this question counsel for defendant objected.

Judge HAMMOND: "I think this objection should be over-
124 ruled. The former ruling I made did not preclude him from asking the question now submitted. He has already examined Dr. Smythe as to whether, in his opinion, the injuries could have been produced by falling from the car to the ground. He has negatived what he supposed to be your theory. Now he has a right to ask Dr. Smythe with specific reference as to the circumstances of this case, whether the traumatic forces the things he finds in the proof will produce these injuries. Mr. Fitzhugh has the

right to ask Dr. Smythe whether or not this described physical injury could have been produced by a blow from the pipe as he has described it in this proof or a combination of that kind of blow and the fall from the car—he can put that question to him and I do not think the form objectionable.

WITNESS: "There comes the question again. I don't think a blow from the pipe would produce it at all, but I am satisfied a blow from the pipe would produce the injury to the jaw-bone. I don't think the scalp wounds and the wounds on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury to the soft parts.

Q. You have stated that all the injuries——

A. I don't think all the scratches and lesions could have been produced from the blow from the pipe or from the fall on the ground.

Q. In your opinion please state whether or not the conditions and injuries described to you could or not have been produced by a combination of blows, to wit, the blow from such a pipe as that where the party's head comes in contact with it when he is on a train running at 20 to 25 miles an hour, and his being knocked from the car after such blow was received—falling to the ground.

A. Yes, sir; I think the combination of blows would account, under the circumstances, for the condition the man was found in.

Q. In your opinion neither the falling from the car nor the blow from the pipe (under those circumstances) alone could produce that combination of injuries?

A. Not alone, no, sir. I am not prepared to say what happened when he fell.

Q. The combination of the blow of the pipe and fall from the car would produce all those injuries in your opinion?

A. I don't know what would produce the blow, but I am prepared to say one blow could not produce the injuries described in your hypothetical question. I am not supposed to answer whether the pipe did it or the ground did it. I think a combination of
125 blows were necessarily inflicted in the production of these injuries described in your hypothetical question.

Judge HAMMOND: "Could the traumatic force of a chain not as large as a trace-chain, the chain going at the rate of 25 miles an hour, produce that or the combination of that and falling from the car produce it?"

Ans. Yes, sir, I think so.

Judge HAMMOND: "There is proof in this record to show that a chain not as large as a trace-chain, the chain being fixed to a movable iron pipe, such as has been described, and some of the witness-say the chain would drag along the top of the car."

A. That would produce lesions, but I do not think that would produce the fracture of the skull, no, sir. It would produce injuries and lesions of the soft part, but not of the bony structure. I do not think striking a pendulous chain would result in the fracture of the bones.

Q. State, if you know, how, when a man in a conscious state and is not intent on suicide, how he will fall, if you know? Falling from a height, what part of his body will naturally hit the ground first?

To this question counsel for defendant objected, which objection the court overruled. And to the ruling of the court defendant duly excepted.

A. Everybody knows how they will fall, if they are not to- high and have no control of themselves.

Cross-examination:

Q. Doctor, I understand you to say that you would not ascribe the injuries described by Mr. Fitzhugh to a single blow?

A. Yes, sir, you understood me correctly.

Q. From the case as put to you, can you form any opinion as to whether the cut described in the chin had any connection with the breaking of the jaw or whether it was that blow that broke the jaw?

A. I could not answer that generally. It might have been produced by a chain or by the fall or by the pipe or anything else. Several things could produce that. I would not say that the blow that split the chin—the injury to the soft part might have been done by the swinging chain. It might have been produced by the swinging chain.

Q. A chain 2½ or 3 feet long with a car running at that rate you say that might have produced this cut?

A. Yes, sir, the chain is still at the time and a great deal of force is thrown at that rate.

Q. Suppose that man were to fall and his chin strike
126 the rough edge or corner of a car, could that produce it?

A. Yes, sir, that could have produced it.

Q. And the force of the blow received either from the pipe, the spout hanging over, or from a fall on the ground would be effected, would it not, by the speed at which the train was going?

A. Very much so.

Q. Do the places at which the jaws are broken indicate necessarily that a blow or blows was received just at those places?

A. In my experience, yes, sir. According to the teachings of some of the text-books, not necessarily, but I have never seen a fracture that I couldn't *con*tribute or ascribe to direct force. That is, if a *man* is on one side of the head the fracture is at the point of injury. The books say sometimes they have it on the other side, but I have never seen one of those fractures. My experience teaches me that fractures by — exist in the imagination. Sometimes a man will have a fracture at the base of the skull on his buttock, but that is direct contact where the head rests on the neck-bone—they come in contact and fracture result- there. My experience is that the fracture results at the point of injury. If you are struck here, you will have a fracture here and not there, unless it is powerful enough

to go on through and break everything and crush the whole business. If a man is hit on the head with a base-ball bat, it is broken here, unless the whole head is crushed.

Q. Doctor, are the injuries described likely to produce unconsciousness immediately?

A. The injuries described by Mr. Fitzhugh? Yes, sir. I should judge that the man was immediately and profoundly unconscious. This blood from the brain that exuded from the ear was positive proof that the base of his skull was fractured and he was immediately and continuously unconscious, in my opinion. I have never seen a man with a fracture at the base of the skull that wasn't unconscious—temporarily at least.

Q. A man found dead with the injuries described in Mr. Fitzhugh's question, it is likely that death was immediate or instantaneous after receiving those injuries?

A. No, sir; death is rarely ever immediate from injuries to the brain. If the brain is pulpified, usually they live 15 or 20 minutes or a half hour, and I have seen them live several days.

Q. But they would be instantaneously unconscious?

127 A. Immediately and profoundly unconscious from such a blow in my opinion. I have seen a great many injuries on the skull and have never seen an extensive fracture of that kind that was not immediately unconscious.

Judge HAMMOND: "If a man should loose his footing and fall from the top of the car running 20 or 25 miles an hour and strike the ground on the chin, would it produce the fractures in the jaw?"

Ans. That could produce the fractures in the jaw, yes, sir.

Q. Could a man, striking level ground, fall on the point of the chin?

To this question counsel for defendant objected, which objection the court sustained.

Ans. A fracture of the jaw could have been produced by an unobstructed fall to the ground. That is, a simple fracture to the jaw.

Judge HAMMOND: "I said the fractures described in these questions?"

Ans. I think fractures could — produced by falling from that height, a man going at such a rate of speed. There is a very tremendous force exerted by a man falling that high from a moving car, but the multiplicity of the lesions lead me to believe that there must have been more than one blow inflicted.

Re-examination:

Q. If a man should fall on his chin at that height, would such a fall produce a clean cut—a fall on the ground—would it produce a clean cut or injury as I have described or mash up the chin?

A. It might split the chin, but there would be a tendency towards contusion of the surrounding parts. Naturally the parts coming in contact with the ground—he might have fallen on a splinter or cross-

tie, but there would have been other evidence of injury around that region.

And further saith not.

Dr. WEBB, being recalled, testified as follows:

Direct examination:

Q. Doctor, you described the injuries which you observed on the body of Mr. McDade when you examined him and the remains were brought to Memphis?

A. Yes, sir.

128 Q. Please restate the injuries which you observed.

A. The lip was split open in front, the teeth were knocked out here, and I think it was on the left side that the ear was split open. I am not positive. He had a little bruise on his forehead and on his hands, and some of his fingers were broken.

Q. What was the condition of his jaw-bone?

A. I am not positive whether that was fractured or not, the corpse was rigid.

Judge HAMMOND: "You didn't take hold of his chin at all?"

Ans. No, sir; I didn't shake it.

Judge HAMMOND: "You only saw the superficial wounds?"

Ans. Yes, sir, I didn't take him out of the coffin at all.

Q. Was there any injury to his nose?

A. I didn't observe that.

Q. Any scratch on it?

A. I don't think there was any scratch on it at all.

Q. Assuming that, that in addition to the injuries you have described, that the jaw-bones were both crushed, please state whether or not you have an opinion of a reasonable certain nature as to what kind of an instrument produced the injury to his face and jaw-bone?

A. You mean whether I think it would be a sharp or blunt instrument?

Q. Yes, sir.

A. From the nature of it, I suppose it would be a blunt one. That is what it looked like.

Q. Please state whether or not the injuries, such as you have described and, in addition, assuming that his jaw-bones were crushed, and that he had scalp wound, on the left side of his head near the rear, whether such injuries could have been produced by a fall from a car 13 to 14 feet in height, running at a rate of speed 20 or 25 miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether those injuries could have been produced by such a fall?

Defendant's counsel objected to this interrogatory, which objection the court overruled, and to the ruling of the court, plaintiff duly excepted.

A. That is most too long a question.

Q. Whether all of those injuries, such as you yourself saw, and, in

addition, the injuries I described, could have been produced by such a fall alone—by a fall of the character I have described.

A. I don't hardly think it could.

129 Q. Please state whether or not such injuries as you saw, and, in addition thereto, the injuries which I have just described to you, could, in your opinion, have been produced by the party coming in contact with an iron pipe about 10 inches in diameter—the pipe striking him on the head while in the position on the side of the car moving at 20 or 25 miles an hour and his falling thereafter to the ground?

A. Could the fall and the lick——

Q. Combine to produce it?

A. Yes, sir; I think that would be al- right.

Q. But, the mere fall, under those circumstances, in your opinion, could not have produced those injuries?

A. I don't see how it could. It might have done it.

Cross-examination:

Q. You can't see either, can you, Doctor, how the mere blow from the pipe, running against the pipe, could have produced those injuries alone?

A. Not all the injuries. I don't think it could possibly. If struck by the pipe, there could have been just one injury.

Q. Which ear did you notice had a cut on it?

A. I think it was the left, I am not positive.

Q. What was the nature of this wound in front on the lip or mouth?

A. The lip was split open and either sewed up or plastered up. It had been attended to and one or two teeth knocked out of the lower jaw.

Q. You didn't notice any wound on the back of his head?

A. I didn't take him out of the coffin at all.

Q. What was the character of this wound on his forehead?

A. Simply a little skin scraped off.

Judge HAMMOND: "Which side of his head was it?"

Ans. "Pretty near the center. I don't remember whether it was on the same side where the ear was hurt or not. It has been so long ago."

Q. Did you notice any discoloration on the side of the jaw or any bruised place?

A. I don't think I remember that. They are always congested a little when they have been dead some time any lying on the back.

Q. If a person should be standing on a car, running at that rate of speed, 20 or 25 miles an hour, a tall person, say six feet, and his chin should strike the edge of the car, might that produce the chin wound?

130 A. How is he going to strike the edge of the car if he stands up?

Q. Suppose he falls down, the car running at that rate of speed?

A. It would take a pretty good lick.
Q. To cut the chin?
A. Yes, sir, and mask the jaw.
Q. I am not speaking of the jaws.
A. Of course you can fall down and burst the chin open and knock the teeth out. You can do that, yes, sir.
Q. Then, if a train is going at that rate of speed, 20 or 25 miles an hour, and a person goes down to the ground 14 feet down, that might produce fracture, might it not, either of the skull or jaw bones, might it not?
A. Yes, sir, it would produce a fracture.

And further saith not.

Mrs. McDade recalled:

Q. You have stated that you examined the body of your husband when he was brought back?
A. Yes, sir.
Q. Did you look at his arms?
A. Yes, sir.
Q. State whether either of them *were* broken?
A. No, sir, I don't think either one was broken.

And further saith not.

Plaintiff offered in evidence the photographs heretofore identified by the stenographer. Mr. Wright objected to same, agreeing that the one identified by Mr. Briggs might be admitted. Whereupon the others were withdrawn.

It was agreed in the event it became necessary, that the statutes of Arkansas is proven.

Plaintiff here rested.

Defendant's Evidence.

W. D. Kennedy, being duly sworn, first deposed on behalf of defendant as follows:

Direct examination:

Q. You gave your deposition in this case, didn't you?
A. Yes, sir.
131 Q. You were with Mr. McDade on what you call the nine and ten run, I believe, is it not?
A. Yes, sir.
Q. During the period you were with him and he with you on the Choctaw, did you pass the Goodwin tank in the daytime ever, or did you pass it often?
A. During the eight or ten trips he was with me, they were about six one, half dozen or the other.
Q. You mean that you passed one in the day and one at night
A. Yes, sir.

Q. What was the schedule of that train? What time did it reach Goodwin going and coming?

A. I don't remember what time it was. Some time during the day.

Q. When; what hour of the day? When was it due there?

A. Conductor Hollwell——

Q. I am asking you, Mr. Kennedy. Give the best of your recollection.

A. I have forgotten whether we were on one or No. 10, but we were due there at 11.38 on No. 10.

Judge HAMMOND: "The train coming from Little Rock this way?"

Ans. Yes, sir.

A. Whether we were on time at that time I don't know. I have forgotten.

Q. I don't mean any particular time. What was the usual time No. 10 passed there?

A. It was supposed to pass there at 11.38 coming this way. This night train I speak of, No. 9, leaves here in the night and is supposed to pass there at 1.27 in the morning.

And further saith not.

C. E. MANDAVILLE, being duly sworn, next deposed and — as follows:

Direct examination:

Q. What is your name?

A. C. E. Mandaville.

Q. What is your business?

A. Car accountant for the Choctaw, Oklahoma & Gulf R'y Co.

Q. I wish you would explain to the jury what your duties consisted of as car accountant for the road.

132 A. My duty is to have a record of all the cars that are handled over the line, including cars of every system. We keep a mileage record of them of every mile the car runs from the time they strike the line until they leave the road.

Q. And you do know, are supposed to know, where every car is?

A. Yes, sir, we have a daily move—one car is allowed 31 days in the month and no other car is mixed in with it.

Q. I wish you would state whether or not you were with the Choctaw road on the 19th of August, 1900?

A. Yes, sir.

Q. How long had you been with the Choctaw at that time?

A. Five and a half years.

Q. That is the old Little Rock and the Choctaw?

A. Yes, sir.

Q. I wish you would state whether or not you are able to determine by an examination of any record that you have whether or not there were any I. C. furniture cars on run No. 9 and 10, and, if

so, can you state to the jury by an examination of your records as to what dates they were on?

A. They have the conductor's train report.

Mr. FITZHUGH: "I object to that as hearsay. You can prove that it is customary to have an interchange of cars between railroads and *that all kinds of cars run on different roads on account of this* interchange, but you can't take a witness and prove by him that a certain man made a report to him on a certain day that there was a car of a certain nature in that train. The report isn't sworn to. There is no opportunity to cross-examine this man that made the report, and I insist that it is hearsay."

Judge HAMMOND: "Did this gentleman count this train himself?"

Mr. WRIGHT: "This gentleman knows the private record of the road as to what cars were in certain trains at the times."

Judge HAMMOND: "Mr. Fitzhugh says you have nothing except the report of some other man to this official that he had such and such a car. This man did not of his own knowledge see and count the cars in this train, but he has a record of those reports, and he says they are hearsay, and he hasn't had an opportunity to examine them, and it isn't the best evidence of what is in the train against a man who says he saw it. I am inclined to *this*, Mr. Fitzhugh's objection is good, Mr. Wright."

133 And to the ruling of the court defendant excepted.

Mr. WRIGHT: "I think I ask- Mr. Hollwell in his cross-examination to produce, if he could, the original slip showing the furniture car, and, if I can find that, I will put him on to prove it. I want to prove it by them both."

Q. Mr. Mandeville, I wish you would examine these reports and tell *the* how they came into your possession, and whether or not any of them have been altered since you have had them?

A. These are the records of all conductors handling cars making reports to our office, and is verified by the agent at every station where the car is taken from and left. The conductor reports the time the train starts out and puts the cars—separates them—puts a system of cars together and different initials together, and makes out report by station number. Memphis is 0 and Little Rock is 132, Brinkley 69, and, of course, a car picked up at 0 and left at 69, these are kept in the office and are kept there indefinitely. We have had them in the office ten years. The only alteration made on them is when a conductor gets a wrong report, gets the number, the figures of cars transposed, and we verify them by the agent's report and also have a slip from conductor saying that it was the wrong number.

Q. Really you don't change them unless he changes them?

A. No, we don't change them.

Cross-examination:

Q. They do sometimes made mistakes in the numbers?

A. The conductors? Yes, sir.

Q. Who files the reports with you personally?
A. We have them mailed—sent to us by mail.
Q. They are mailed?
A. Sometimes the conductor brings them in the office.
Q. Do you open the mail?
A. I have a chief clerk who opens the mail.
Q. The reports first come to your chief clerk?
A. Yes, in my office.
Q. Your chief clerk handles them first?
A. I may handle them and he may.
Q. The chief clerk is the only man that handles it?
A. I open the mails frequently. If I am there first in the morning, I open it.
Q. But, as a rule, the chief clerk is the one that does that kind of work?
A. When he is there first. I may do it five times in a week.
134 Q. Do you really ever do it five times in the week?
A. Yes, sir.
Q. Don't your chief clerk get to the office first?
A. Sometimes he is out on the road.
Q. You only open it when he is away?
A. No, sometimes the clerk has some special duties in the morning and I open them myself.

And further saith not.

Mr. C. A. HOLLWELL, being duly sworn, next testified as follows:

Direct examination:

Q. You gave your deposition in this case, didn't you?
A. Yes, sir.
Q. I asked you this question on cross-examination: "Had you been handling furniture cars since Mr. McDade had been a brakeman under you?" You answered: "I couldn't make a definite statement as to whether we had one in the train previous to that time or not. I can refer back." Question: "Please do so and answer that. You did handle them frequently." Did you sign any of these reports. I wish you would look and see the ones you made out and signed as conductor while Mr. McDade was with you.

Judge HAMMOND: "It isn't the purpose of the testimony to show that there was no furniture car in the train that night?"
Mr. WRIGHT: "No, sir. I want to show that he had been over the road before on furniture cars, that Mr. McDade had been a brakeman on furniture cars passing the tank."

A. I find here on train No. 10, July 16. That is the train east bound from Little Rock coming this way.
Q. That is a train that would pass Goodwin in the day?
A. Yes, sir. No furniture cars on that record.
West-bound train No. 13, leaving Hopefield at 4.15 a. m., July 18,

arriving at Little Rock 9.55 p. m. same date. W. D. Kennedy and J. I. McDade brakeman on that.

Q. Does that show any furniture cars on that?

A. No furniture cars on that day. Train 10, east bound out of Little Rock at 11.15 a. m., 7/23, no furniture cars on that. Arrival at Hopefield 9.40 a. m. & /24.

Judge HAMMOND: "Any furniture cars on that?"

135 A. "No furnitures on that at all."

Train No. 3 left Hopefield, west bound, at 9 a. m., on the 24th, arriving at Little Rock at 11 p. m. same date. We find check up in that M. K. & T. furniture 2506.

Q. Is that of the same character or about the same character as the Illinois Central furniture?

A. It is about the same height and length of the Illinois Central.

Q. You say that was July 24th?

A. Yes, sir.

Q. Left Hopefield at 5 o'clock a. m.?

A. Yes, sir.

Q. What time would that pass Goodwin?

A. I think there is a mistake. Let me refer back. I think that should read 9.40 p. m. of the 7/23 No. 10, east bound, instead of a. m.

Q. Are you satisfied that the car was in there? Can you refer to that?

A. This car M. K. & T. 2506 was in train No. 13 on the 24th.

Q. The day the furniture car was in the train where did they leave from?

A. Left Hopefield at 5 a. m.

Q. Was there a mistake in that about the time of leaving or not?

A. On the date of the train previous to that.

Q. What time did the train that had the furniture in it to which you have referred pass Goodwin tank?

A. You would have to refer to the train sheet. I have no record at all of passing there.

Q. Can you tell whether they passed there in the daytime or not—whether you got there before night?

A. I think it passed in the daytime.

Q. What is the next one that you find? Go ahead.

A. Train No. 14, July 26th, out of Little Rock at 7.10 a. m., arrived at Hopefield at 2 a. m. 7/27.

Q. What did you have in that in regard to furniture cars?

A. In that we find M. K. & T. 2455 furniture, Little Rock to Memphis.

Q. Go ahead to the next one.

A. Train No. 9, out of Hopefield at 11 p. m. 7/27. Arrival at Little Rock 12.30 p. m. on the 28th. M. K. & T. 2748. That furniture car was only handled from Brinkley to Little Rock—it didn't pass Goodwin tank.

Q. It didn't pass Goodwin tank, but was handled on your train?

A. It was handled on the train west of Brinkley. Train
136 No. 10, July 27th, out of Little Rock at 12.30 p. m. Arrival at Hopefield at 5.30 p. m. same date. That is a short train, very small train, and we made fast time on it.

Mr. WATSON: "You can't run it in less than six hours."

A. I have run it in less than 6 hours with a small train. There was no furniture cars in that train.

A. Here is extra east, left Little Rock at 7.05 p. m. of the 29th, arrived at Hopefield at 3.50 a. m. of the 30th. No furnitures in that. No. 9, July 30th, left Hopefield at 9.30 p. m., arrived at Little Rock at 6.10 a. m. on the 31st. In that was L. & N. 9531.

Q. How did that correspond in height and character with the car Mr. McDade was on?

A. It was a fraction smaller.

Q. Can you give the dimensions of that L. & N. car? Do you know them yourself?

A. No.

Q. It is a fraction smaller than that?

A. Yes, sir.

Train No. 10, of August 5th, left Little Rock at 11 a. m., arrived at Hopefield at 8 p. m., M. K. & T. furniture 1941. Extra west left Hopefield at 8.50 p. m. of Aug. 26th. Arrived at Little Rock 6.15 a. m. Aug. 7th, M. K. & T. No. 2220.

Mr. FITZHUGH: "Was that a furniture car?"

A. Yes, there is a change in the brakemen on that.

A. Here is No. 9, July 10, or August 10, I should say. Left Hopefield 9.25 p. m. Arrived at Little Rock 5.35 a. m. of August 13th. In that we find furniture 28389.

Q. How did that compare with the others?

A. In height and width that is the same as the I. C.

Q. Pass on to the next one.

A. Also M. K. & T. 2668. Same train, 2442 M. K. & T. and 2833 M. K. & T.

Q. Could you tell by that sheet whether you stopped at Goodwin those nights?

A. No, I couldn't, have no record at all of the stopping. On this train we wouldn't stop at Goodwin at all unless it was necessary to have water.

Q. As a rule that night train went through?

A. Always passed through. Of course some stopped there.

Here is train No. 10, left Little Rock at 9.50 a. m. Arrived at Hopefield 6.50 p. m. No furniture cars in that train.

Q. Does that complete your runs?

A. The next train, No. 10, Aug. 11, left Little Rock at 4.20 p. m. Arrived at Hopefield 4.20 a. m. of the 12th. No furniture cars in that train. Train No. 9, Aug. 12th, left Hopefield at 8.55
137 p. m. Arrived at Little Rock 7.15 a. m. of August 13th. In that we find furniture 28389. Extra east August 13th, left Little Rock at *Lo* p. m., arrived 9.30 a. m., August 14th. That had a M. K. & T. furniture 2040 and 2740. Extra east August 15th.

This was a work-train working between Little Rock and Brinkley—would it be necessary to have that record?

Q. If that didn't pass Goodwin, no.

A. I guess I am wrong on that. I see it left Little Rock 11.40 a. m. on August 15th, and arrived at Hopefield 4.30 p. m., August 16th. No furnitures in there. Here is train No. 9, Aug. 16th. Left Hopefield at 10.40 p. m. Arrived at Little Rock at *Lo.*50 a. m. on Aug. 17th. There were no furnitures in that. Here is train No. 9 on August 18th. Left Hopefield 9.30 p. m. Arrived at Little Rock at 11.25 a. m., August 19th. In that was I. C. furniture 28488, 28149 and 28362 and 28311. M. & T. 2883.

Q. Could you tell how many freight cars were on there that night? Do the records show that?

A. Yes, I can tell by referring to the records. I also have a memorandum of that number.

Q. How many cars were there?

A. I haven't got that either. You want the total number at that time passing that point—the total number—leaving Hopefield?

Q. Yes, the number passing that point.

A. 27 cars in the train leaving Hopefield.

Q. How many when you got to Goodwin?

A. Twenty-five.

Q. Do you group all these cars together? Put the I. C.'s together and the others together?

A. No, they are mixed in the train.

Q. You put them together there on your sheet?

A. They are all together on the record. On this trip there were four I. C.'s in the train, three of them together.

Q. Do you know which were ahead of the other—was car 281491 of this three?

A. Car 28149 was rear of the three.

Q. And he was upon that car?

A. That was the car his lantern was found on.

Q. There was a M. K. & T. car in there, wasn't there?

A. Yes, sir.

Q. Was there another still?

A. There was a fourth I. C. furniture in a different part of the train.

Q. Where was that?

A. I couldn't tell that—something near the head of the train.

138 Q. That was still further ahead where he was standing?

A. Yes, sir, this I. C. furniture car was the rear furniture car of all in the train.

Cross-examination:

Q. So that, there intervened between the engine and the car on which Mr. McDade was found four furniture cars in that train?

A. Four of them, yes, sir.

Q. Mr. Hollwell, referring back now, you have given there all the furniture cars which were used in any train on which Mr. McDade

was a brakeman while in the employ of the Choctaw, Oklahoma & Gulf on the Memphis division?

A. All of those in trains handled by me.

Q. Wasn't he a member of your crew?

A. Yes, sir.

Q. From what time was that time?

A. From July 16th to his decease.

Q. You say you make out those reports?

A. Yes, sir.

Q. Do you designate the character of the car as box car or furniture car?

A. Yes, sir.

Q. Turn to train No. 13 of July 24th, please. Let me see the report.

Witness hands same to Mr. Fitzhugh.

Judge HAMMOND: Why do you have a larger furniture car? Because the ordinary freight cars won't hold enough?

A. I think the idea in using furniture cars they use them for a lighter grade of freight than ordinary box cars, such as buggies, lanterns and furniture.

Q. Is it necessary to have them larger than the others?

A. Yes, sir, in order to get the capacity.

Judge HAMMOND: The furniture takes up so much space?

A. Yes, sir. The ordinary car wouldn't hold within several thousand pounds of the capacity.

Q. Furniture is shipped in other cars also though, isn't it?

A. Yes, sir.

Q. You say that you think this train which left No. 2 at 5 a. m.——

A. That is Hopefield.

Q. You think that passed in the daytime?

139 A. Leaving Hopefield at 5 a. m. in the morning, yes, sir.

Q. I see a correction has been made in the M. K. & T. 2864—was that made by you?

A. Is it in ink or lead pencil?

Q. The lead pencil is rubbed out and this put in.

A. I expect I did that in making out this report.

Q. That is the first one according to your statement, I believe, that a furniture car in it—July 24th?

A. Yes, sir.

Q. Train No. 14, July 26th, left Little Rock at 7.10 a. m., and arrived at Hopefield at 2 a. m. Would that pass Goodwin at night?

A. Probably after dark.

Q. How far is it from Goodwin to Hopefield?

A. 57 miles I think. From Goodwin to Hopefield.

Q. You think that passed Goodwin in the night and got to Hopefield at 2 a. m.?

A. I couldn't tell anything about that. You would have to refer to my leaving time on the sheet leaving Brinkley.

Q. What is the usual run from Goodwin to Hopefield?

A. It depends altogether on the work we have to do. That 14 is a local.

Q. That train No. 9, leaving Hopefield at 11 p. m., July 27th, that ran only between Brinkley and Little Rock, you say?
A. Yes.
Q. Train No. 9, leaving Hopefield at 9.30 p. m., July 30th. That would pass Goodwin before daylight, would it not?
A. The probability is it would.
A. It is a fast train, but you might be delayed on it.
Q. It left Hopefield at 11.50 p. m. That passed Goodwin in the night?
A. Leaving Hopefield at 11 o'clock and arriving at Little Rock would leave no doubt that we passed there in the night.
Q. A train leaving Little Rock at 11 a. m. and arriving at Hopefield at 10 p. m., would that pass Goodwin in the night or not?
A. It would pass Goodwin in the afternoon—probably before dark.
Q. And train west extra, leaving Hopefield August 6th at 11.50 p. m., and reaching Little Rock at 10 a. m.——
A. That would leave in the night also.
Q. Train 9, August 10th, leaving Hopefield at 10 and
140 reaching Little Rock at 9.20, that would pass in the night?
A. Yes.

And further saith not.

It was here agreed between counsel that the age of Bettie G. McDade, widow of deceased, is 29 years, and that her expectancy would be what the Carlyle table showed.

R. B. HERRING, being duly sworn, next deposed as follows:

Direct examination:

Q. What is your present business?
A. Locomotive engineer.
Q. What road?
A. K. C. M. & B.
Q. This is the road on which Mr. Briggs is master mechanic?
A. Yes, sir.
Q. I wish you would state whether or not you ever ran over the Choctaw road as engineer or the Little Rock and Memphis.
A. Yes, sir, I worked there about sixteen months.
Q. You are an experienced locomotive engineer, as I understand?
A. I have worked ten years at it.
Q. What position did you occupy on any road before you were engineer?
A. I fired on the Choctaw, Oklahoma & Southwestern.
Q. As a locomotive engineer, I wish you would state whether or not, and from your experience on various roads upon which you have run, whether or not you are familiar with the general construction of water tanks and especially whether or not you are familiar with the angles at about which the sway spout stand with regard to the tracks.
A. Yes, sir, I think I am.

Q. I wish you would state when you ran on the Choctaw, Oklahoma & Gulf R. R. When was that?

A. I quit there about fifteen days ago. About the 15th or 18th of the month.

Q. I wish you would state how long you had run as engineer over the Choctaw, Oklahoma & Gulf when Mr. McDade was killed. He was killed on the 19th of August, 1900.

141 A. I went to work for the Choctaw the last of September a year ago.

Q. You had been working there nearly a year when he was killed?

A. Yes, sir.

Q. Did you ever have occasion to notice the water tank situated at Goodwin, Ark.?

A. Nothing particular. Only just the same as all other tanks.

Q. You had noticed that tank?

A. Yes, sir, taken water there many a time.

Q. I wish you would state whether or not, with regard to the angle at which the sway spout hung, whether or not that was a standard uniform tank, if you know. Such a tank as is ordinarily used on well-regulated roads.

A. The spout was just about the same as all the rest on the road.

Q. On the other roads how was it?

A. About the same as everywhere.

Q. Have you recently been over the track of the K. C. R. R. Co.?

A. Yes, sir, I was over it Monday.

Q. Why did you go over that road?

A. Working over there.

Q. Did you go over the road to learn the road as an engineer?

A. Yes, sir, you have to go over to learn the road.

Q. Where did you run from?

A. From here to Birmingham.

Q. What is the distance from here to Birmingham?

A. 248 miles.

Q. I wish you would state whether or not the sway spouts upon the K. C. M. & B. road are like the sway spouts upon this tank at Goodwin—the same character.

A. They are all about the same plan.

Q. About the angle which they hung—was there any marked difference? On the K. C. road are all the tanks hung vertical—that is, straight up and down?

A. No, sir, they hang over.

Q. At an angle and about the same angle as on the Choctaw?

A. As near as you can tell it, guessing at it.

Q. As near as you can tell it passing and taking water?

A. Yes, sir.

Cross-examination:

Q. You say when you were on the Choctaw road you didn't pay any particular attention to this tank or spout at Goodwin?

142 A. No more that I would any other tank.

Q. Were you looking out for angles then?

A. A man would naturally look out for a spout on a tank to see that it didn't hit him while on the engine.

Q. Your attention wasn't particularly called to this particular tank?

A. No more than it was to any other tank.

Q. Do you know how these tanks are constructed and how it is intended for the spout to hang when it rests and not in use?

A. I know how nearly all I ever seen hang.

Q. How do they hang with reference to the cars—they are intended to clear the cars all right, are they not?

A. Yes, sir.

Q. To clear the car, if any one is sitting on the side of it?

A. Yes, sir.

Q. If they don't — high enough above the edge of the car when the brakeman is sitting on the side, they don't hang in the correct or proper position?

A. I never seen one but what did.

Q. All you have ever seen hung high enough above the edge of the cars to clear a man?

A. Yes, sir.

Q. It is known that brakemen are bound to be on top of the cars, is it not?

A. Yes, sir.

Q. That is their duty and that they ride sitting on the side of cars, and all the tanks you have ever observed on any other road hang sufficiently high above the highest car that is used in a train to clear it and a man sitting on the side of it?

A. Yes, sir, when they are in proper condition.

Q. And, if they do not go back to a position sufficiently far, when a man is sitting on the side, it is due to the fact that the chain may be too long to which the weights are attached?

A. The fireman may not have thrown the spout up far enough.

Q. If the weights are resting on the platform and it is then not sufficiently high to clear a man on the side, it is due to the chain being too long or the band or pipe to which the chain is attached being in a wrong position?

A. I suppose so, I never saw one that way.

Q. With reference to these tanks that you say you have seen on the K. C. road. You never examined or made any study of the particular angle. You simply saw that they were sufficiently high to clear the engine and clear the car and a man sitting on the side of it?

143 A. Yes, sir.

Q. If the brakeman gives the signal received by him from the conductor to the engineer, he sits on the same side the engineer is on, doesn't he?

A. Not all the time.

Q. If he wants to give the signal to the engineer?

A. Yes, or he can stand on top in the middle of the car.

Q. But sometimes they sit on the side of the car?

A. Yes, sir.

Judge HAMMOND: When the fireman has finished using one of those spouts to fill his tank, does he have to throw it up or does it fly up of itself?

A. He throws it up until it gets above a certain angle. He has to give it a toss to get above to where the chain has effect on it.

Q. If the weights are sufficiently heavy, it pulls it back up?

A. Yes, sir, to its place.

Judge HAMMOND: You said, if the fireman didn't push it far enough up——

A. He has to give it a toss.

Q. They have two weights attached to two chains attached to a pulley?

A. Yes.

Q. When the chains are of proper length and the weights are sufficiently heavy, when the fireman gets through, it goes back up nearly straight?

A. Yes, sir.

Re-examination:

Q. I will ask you if a brakeman was sitting on the side of a car as you passed this Goodwin tank, and in the proper position, would he clear that spout, if he was in the proper position?

A. I think he would sir.

Q. You say, while you haven't paid any accurate attention, you have paid attention to the angles of these spouts?

A. Yes, sir.

Q. In passing and looking at them to see them, you didn't get hit, and as to what angles they were, you find the spouts at Goodwin just like they were on the K. C.?

A. Yes, sir.

Q. Now, if the fireman doesn't push the spout up far enough, the next train coming along would bump into it, would it not?

A. If you were on the box car, it would hit you.

144 Q. You mean the car behind the engine would hit it?

A. Yes, sir.

Judge HAMMOND: Tell us what you mean by proper position.

A. When the pipe is up where it ought to be. If it goes clear back against the tank, the fireman has to get a hook or something to pull it down.

Q. You said when the brakeman was in proper position on the car, what do you mean by that?

A. Some ride on one side and some on the other and others in the middle.

Judge HAMMOND:

Q. Suppose he should be standing in the middle of the car, will he clear it?

A. Yes, sir, if he was standing in the middle of the car he would not touch it.

Q. And the brakeman has the choice of a good many positions where he can stand and sit?

A. Yes, sir.

Q. While some ride sitting on the edge of the car, others ride on the middle, etc.?

A. There is no rule about riding on them.

Q. I will ask you this—as a matter of fact, are there not, on well-regulated roads, various obstructions, if a man chooses to he can lean out far enough to get him—that is a fact, isn't it?

A. Yes, sir, there are overhead bridges.

Q. Judge Hammond asked you the question—a brakeman in sitting on the side of a car is supposed to sit in a position that he will not get struck by obstructions from the side—is he not?

A. Yes, sir.

Q. It is the duty of a brakeman and of the railroad men generally, as they go over the road, to notice, not only tanks, but anything that inclines toward the track?

A. There is generally a bulletin-board to the effect that such and such a thing won't clear a man.

Q. Is it their duty to notice all things that may endanger them?

A. Yes, sir.

Recross-examination:

Q. You say, when there is anything liable to strike a brakeman who is on the car, or where there is any danger from the obstruction, it is usual and customary to put up a bulletin notifying the employés of that fact?

145 A. Where I come from before I went with the Choctaw there was a guard, a lot of ropes hung around to strike a man. If there is a wire across the track—a telephone or telegraph wire.

Q. Anything liable to strike a man?

A. Any unusual obstruction.

Q. Anything liable to strike him when he is in the discharge of his duty, it is customary to put up a notice?

A. Yes, sir, anything unusual.

Q. If a water tank were in a position to strike a man when sitting on the car, that would be unusual?

A. I never saw one of them.

Q. You spoke of reaching up to get the spout. How far over does the cab of an engine extend beyond the rail?

A. I have no idea. Some of them are a heap wider than others.

Q. Give about the distance.

A. There is a difference in the class of engines. The Choctaw has three or four width of engines. They have some small engines, not near as wide as the large engines.

Q. Give about the width of them?

A. Four feet 8½ inches.

Q. What is the width of the cab beyond the rails?

A. I have no idea. I never measured a cab.

Q. It would extend beyond the rails?

A. Yes, sir.

Q. Does it extend beyond the cross-ties?

A. Some will and some won't.

Q. What is the length of a cross-tie, the portion outside of the rail?

A. The cross-tie is supposed to be eight feet in length about eighteen inches outside of the rail.

Q. And some of the cabs will extend beyond the cross-ties?

A. Yes, sir.

Q. What is the height of the floor of a cab above the rail—what is the average?

A. They have some engines over there that are over ten feet and others are worse than that. Some of them are fifteen feet. They have some big engines over there. I don't suppose the small engines are over ten feet.

Q. The small engines—the floor of the cab is ten feet above the rail?

A. No, not the floor. The deck of the engine is three feet off the road and the roof is ten feet. The floor of the cab is generally about three feet off of the rail. It depends on the size of the wheel—how high the track is.

Q. You say that many of them extend beyond the end of the cross-ties?

146 A. Yes, sir.

Q. You say the cab of the small engines are ten feet high in all?

A. I suppose that would be nearer ten feet, maybe more than ten feet. Not under ten, the small engines.

Q. And the highest would be fifteen?

A. Yes, 13 or 14 anyway. I can stand up on the running board and my head will just about come to the roof of the cab.

Judge HAMMOND: How tall are you?

A. Six feet.

Re-examination:

Q. Did you ever run any of these big engines on the Choctaw by the Goodwin tank?

A. Yes, sir.

Q. Did the tank ever hit that engine—the spout?

A. No, sir.

Q. You say that is fifteen feet high?

A. Yes, sir; they have got 3 or 4 different classes of engines.

Q. How tall are the tallest?

A. Maybe between 14 and 15—maybe 15.

Q. They extend about 18 inches over the rail further than the cross-tie, some of them?

A. Yes, sir.

Q. And the cross-tie is 18 inches past the rail?

A. That is the outside width—cab and all. It makes a protection to keep water off a man when it rains.

Q. You stated for any unusual obstruction they would post a bul-

letin. Was this water tank, as you knew it before the accident, an unusual obstruction?

A. No, sir; it had been there ever since I had been there.

Q. How long had you been there?

A. Nearly a year.

Q. During the time you were then on that road, so far as you knew, was any one ever hurt by this tank or the spout of it that you know?

This question was objected to by Mr. Fitzhugh and withdrawn by Mr. Wright.

Recross-examination:

Q. When did you quit working there?

A. About the 15th or 18th. Between the 15th and 20th of this present month—January.

Q. You say that that tank was the same spout, looked the same all the time up to the time you quit?

147 A. No, the tank used to have a house around it.

Q. Do you say that water-spout hung at the same angle after the house part was taken away?

To this question Mr. Wright objected, Judge Hammond sustaining said objection, and to the ruling of the court defendant duly excepted.

Q. Were you subpœnaed in this case?

A. Yes, sir.

Q. Who summoned you?

A. The Choctaw, Oklahoma & Gulf R. R., I suppose. I was notified to come here.

Q. I am asking you is you were summoned by the marshal?

A. I was notified by Mr. Kilpatrick.

Q. Are you in the employ of the Choctaw road now?

A. No, sir; Mr. Kilpatrick told me he would want me here.

And further saith not.

Mr. FRANK SAYERS, being duly sworn, next testified as follows:

Direct examination:

Q. What is your name?

A. Frank Sayers.

Q. What is your business?

A. I do work on the pumps between here and Booneville.

Q. What department of the Choctaw, Oklahoma & Gulf Company are you in?

A. Well, it is the water service.

Q. Does the water service embrace the construction and the attending to tanks on the road?

A. Well, not the carpentering work.

Q. The other part of the work?

A. Yes, sir; that is, we are supposed to look after the spouts, piping and keep the tanks in shape generally.

Q. With what road were you before you went with the Choctaw?

A. On the Gulf, Colorado and Santa Fe.

Q. How long were you with them?

A. Two years.

Q. How long have you been in the railroad service?

A. About eighteen years?

Q. Do you know the tank at Goodwin?

148 A. Yes, sir.

Q. I wish you would state whether or not you made any measurements at that tank, and, if so, what?

A. I got a letter to go there and make those measurements about two weeks after I heard of this accident.

Q. Had there been any change whatever in the tank or anything about it?

A. Not up to that time—at least, that I could notice. The spout hung about the same as it always did.

Q. Did you make these measurements?

A. Yes, sir.

Q. I will ask you to state what was the distance from the supply pipe that is—dropping a line perpendicularly from the supply pipe to the ground—the stationary pipe—dropping a line perpendicularly from the bottom of the stationary pipe to the ground, what would be the distance from that point on the ground to the rail—if you made that measurement?

A. I didn't exactly make it in that way. I made it from where the spout was attached and that measures six feet five—about that. I measured with a rule so it might vary half an inch.

Q. The bottom of the sway pipe would be a fraction nearer the track than the mouth of the supply pipe?

A. No, it would be a little further back. When the chain pulls the spout sets over the supply pipe.

Q. But you did make it from the bottom of the sway spout?

A. Yes, sir.

Q. And, from the bottom of the sway spout, it was six feet five inches to the track?

A. Yes, sir; to the outside of the rail.

Q. You say that measuring it from the bottom of the supply pipe would bring it a little nearer to the track?

A. No, sir; further off from the track. The chain is attached to the spout at the next side to the tank—so that it would bring the measurement further from the rail.

Q. What I mean is, it brought it nearer to the rail?

A. No, sir; further back.

Judge HAMMOND: The end of the sway pipe is nearer to the rail than the mouth of the supply pipe?

A. Yes, sir; but where I took the measurement was from the back of it on account of that being where it was attached to the tank.

Q. What is the diameter of the sway pipe?

A. They run from 11 to 13 inches—12 inches—that would be as near as I could give it.

149 Q. Then there would be only about 3 inches difference. About how many inches difference would there be?

A. Between 3 and 5 inches. When I took the measurement the spout was run up like the chains would pull it.

Q. As I understand you, you took your measurement from right here?

A. Right at the back where the chain is attached.

Q. And the difference would be this little part of the supply pipe?

A. It would not be the full width of the spout because the spout generally extends out when it is in position—outside of the supply pipe—that is, the edge of it. That will probably run four inches. When that pipe comes down it goes over the mouth of this goose-neck that comes out from the tank.

Q. Did you make any measurement from the top of the spout and whereabouts on the top?

A. The top of the plumb line down in front of the nozzle of the spout, that is, the elbow that turns out toward the track when it is in position. Before this I made another measurement, I measured the spout proper right under the goose-neck, and that was between 12 and 13 inches.

Q. Show the jury the top of the spout where you made the measurement.

A. I made it from the outside of the spout right at the back, right there——

Witness used a photograph to explain.

Q. And the outside measured 6 inches?

A. Yes, sir.

Q. Then you measured from the inside of the nozzle but the outside of the pipe and that was 12 or 13 inches?

A. Yes, sir.

Q. From the foot of the nozzle to the track—from the place where the nozzle of the spout joins on the outside of the spout to the ground, that was 12 or 13 inches?

A. I didn't state that exactly. I didn't pay much attention to that.

Q. I will ask you this question with regard to its being the proper measurement. As a matter of fact, would the plumb line you dropped from where the nozzle joins onto the pipe—would that be the furthest place toward the track that this could project?

A. The line dropped in front of the nozzle—that came over the closest point.

Q. That point comes out right over the track—toward the track directly?

150 A. Yes, sir; toward the track.

Q. How high is this nozzle from the track?

A. Nineteen feet six inches.

Q. Now, could a man, standing on any kind of a car—could his head reach that goose-neck?

A. I don't think so. They make some of those furniture cars large and high, but I don't think there are any of them that any man could stand on it and the nozzle strike him. I don't think they could.

Q. So, then, the nearest point, where the pipe could strike a man would be some other point on the pipe other than the nozzle?

A. That is why I thought to take the other measurement.

Q. You did think it proper to make that, too?

A. After I found out there would be a lawsuit, I thought that would be proper, too.

Cross-examination:

Q. Mr. Sayers, you say that you received a letter to go there and make these measurements—from whom?

A. Mr. F. A. Loose, the foreman of the water service.

Q. Have you got that letter?

A. No, sir; I had it in my valise and they were stolen.

Q. What was the date of that letter?

A. I think the 4th of September.

Q. Are you positive about that?

A. No, I won't swear positively, because I ain't got the copy of it, but it was along the first of the month.

Q. Who went with you to take these measurements?

A. I had a helper with me. His name is Hanks. He is at Shawnee, I think, out West.

Q. Where is Shawnee?

A. Out West on the Gulf, Colorado.

Q. You took a helper with you?

A. Yes, sir.

Q. Tell the jury how you made these measurements. You two together made the measurements, did you?

A. Well, yes.

Q. One dropped the line down and the other put down the measurements——

A. One marked on the ground where they come and I got down and measured from the rail out.

Q. Who dropped the line?

A. I did.

Q. Where were you at the time?

A. On top of the frame of the tank where the spout is.

151 Q. You were on top of the frame and had to reach over a good distance to drop this line over?

A. There is a bar goes across you can stand on so you can reach up to the spout. You have to reach up.

Q. You have to reach a considerable distance in order to drop that line over the spout?

A. Yes, but we slipped the line over the top.

Q. How did you get the line over the nozzle?

A. I had a little piece of stick and shoved the line on top and slacked the line.

Q. You had to put your tape-line onto a stick?
A. It was a string, I didn't have a tape-line.
Q. You had to tie that onto a stick and drop it over?
A. Tied it onto a piece of iron.
Q. How long was that iron?
A. It was a nut off a bolt—a tap.
Q. In order to get over the nozzle you tied it onto a stick?
A. No, I just put the stick under and reached it up, standing on this cross-piece that goes across.
Judge HAMMOND: Whatever process you used to drop it, you got a straight line?
A. Yes, sir.
Q. You dropped the line over by leaning out from the upright brace?
A. If you will let me, I will explain. On account of the spout being so far out, the spout is so high you can't reach it——
Q. How long is the spout?
A. Nine feet.
Q. Where is the cross-bar on which you say you stood?
A. It is 2 foot 4 inches above the goose-neck. Somewhere in that neighborhood.
Q. How high are you?
A. About 5 foot 6 inches.
Mr. WRIGHT: Explain what you mean by goose-neck?
A. I mean the elbow that is on the spout. The closest part of the spout to the track.
Q. You say this bar you stood on is 2 feet 4 inches higher than that?
A. It is somewhere in that neighborhood. They vary.
Judge HAMMOND: He is speaking of the goose-neck of the stationary pipe. He stood on the cross-bar 2 feet 4 inches above the stationary pipe and reached up and put his plumb line on the nozzle.

Q. Mr. Sayers, how far is the top of that water-spout from
152 the line drawn perpendicularly from the point where it rests on the stationary pipe?
A. Nine feet about. We call that a nine-foot spout.
Q. I am not asking for the length of the spout. Draw a line from the stationary pipe—the end of the stationary pipe—perpendicularly this way. How far out is the end of the spout?
A. They are about 3 to 1. I suppose it would be 27 inches. That is the way they generally hang when they are in proper position, 27 or 8 inches.
Q. Only about 27 or 8 inches?
A. That is about the slope from the outside of the bottom to the top, that is, they slope out toward the track from the bottom about 3 to 1.
Q. You say the perpendicular line, dropped from the bottom of that spout where it connects with the stationary pipe—dropped from there to the outside rail is 6 feet 5 inches?

A. Yes, from where I measured where it is connected with the spout.

Q. That is to the lower end of the spout practically?

A. Yes, sir; the back of it. That is the back of the lower end of the spout.

Q. Did you say, dropping a line perpendicularly from the front end of the nozzle of that spout—that is the extreme part of it to the ground, the distance from that perpendicular line to the rail is about 6 inches?

A. From the outside of the nozzle, yes, sir.

Q. What slant does that indicate? What slope does that indicate? The slope of that pipe?

A. I don't know exactly.

Q. Take the distance from the perpendicular line dropped from the bottom of the water-spout—that is, where it connects with the stationary pipe—the distance from that line to the outer rail, the nearest rail—is 6 feet 5 inches?

A. Yes, sir.

Q. Doesn't that show a slope in that pipe of nearly 6 feet 9 inches; doesn't that show a slope of 5 feet 11 inches at the time you took that measurement?

A. The spout sets back on the goose-neck.

Q. Taking those measurements—you made them and say they are correct—doesn't that show a slope in that pipe of 5 feet 11 inches and that that pipe, the nozzle of it, instead of being 27 inches from a vertical line, running from the stationary pipe upwards, as you state, was 5 feet 11 inches from it?

153 A. I mean the outside of it but I didn't measure it that way. I don't take that measurement you are asking of. I measured from the front and then the back.

Q. But, taking the front, wouldn't that show that the front part of that nozzle—that is the part nearest to the track—was 5 feet 11 inches from a vertical line drawn—from the place where the pipe connects with the stationary pipe? Wouldn't it indicate that much slope. Isn't that a fact?

A. I don't understand it. The outside measurement I will swear positively to that—as near as I could measure it that was right.

Q. Taking the measurements just as you say they were, in order to get the slant of that pipe, don't you subtract the distance from the perpendicular line dropped from the lower end down to the rail for the distance from a perpendicular line dropped from the nozzle to the ground to the rail, and don't that give the slope of the pipe?

A. Yes.

Q. That shows the incline or slant toward the rail—the difference between those measurements.

A. I don't see how it could.

A. Mr. Sayers, if you know the distance from this bottom here of this spout to the rail and know the distance from the top or front part of the nozzle to the rail, isn't the difference between those measurements the slope or angle toward which it is inclined?

A. Yes, I think it is.

Q. In other words—to illustrate it—take this as the supply pipe right here. Here is your water-spout. The distance from this point, dropping a line perpendicularly from here—drop a line perpendicularly from here to the ground—you say the distance from that to this rail is six feet five inches?

A. If you will let me explain that, I will show you. The spout don't set in that way.

Q. Show how it sets on that piece.

A. That is the way.

Q. Take a perpendicular line from the place where you did this side of the spout.

A. This spout connects back to the frame, and I measured back where it is connected.

Q. Next to the frame, you say?

A. Yes, sir.

Q. The pipe is connected to the frame how?

A. This chain connects the pipe to the tank.

Q. Where does the chain touch the pipe?

A. Here. From the frame on the tank. The back of the spout sets back.

154 Q. The spout sets on the back? How far back does it set?

A. Probably 16 inches, 14 inches, something like that. It may vary.

Q. Didn't you make the measurements dropping the line from the stationary pipe?

A. The nozzle of the goose-neck.

Q. Did you drop a line from that down?

A. No.

Q. No matter where you made the measurements, suppose this is the position of it. You measured from back here on this end?

A. Back here, where the spout is connected.

Q. How far back from the end of the nozzle of the supply pipe does this front end of the water-spout—how far is it?

A. I should say 9 or 10 inches.

Q. The back side would be how much more?

A. I mean the back side. The front of it didn't set back ten inches.

Q. Then, there is only a difference of ten inches from the point you measured and the nozzle of the stationary pipe?

A. Somewhere about that—10 or 12 inches.

Q. Then, the distance from a perpendicular line, dropped from the nozzle of the stationary pipe to the outer rail would be ten inches less than 6 feet 5 inches, wouldn't it?

A. Somewhere in that neighborhood.

Q. That would be 5 feet 8 inches? I am getting at this. The distance from a line dropped perpendicularly from the end of this stationary pipe to the outer rail would be five feet eight inches—that is 6 feet 5 inches less the ten inches?

A. I didn't measure that.

Q. Didn't you just state that the water-spout from where you measured was ten or 12 inches? Well, ten or twelve taken off of 6 feet

5 inches, suppose it is five feet eight or five feet six—that is the distance from there to the rail from the supply pipe. Now, the distance from a line dropped vertically to the ground from the nozzle to the rail was 6 inches?

A. Six inches outside of the rail.

Q. What slope would that indicate in this pipe?

A. The difference between the two.

Q. In other words, it would indicate that the end was five feet nearer the rail than this end.

A. Yes, sir.

155 Q. And there would be a slope of 5 feet in a distance of 9 feet?

A. The spout is attached with a chain so when the weights pull the spout up——

Judge HAMMOND: Where did you put your plumb line when you got that five feet six inches?

A. Right here (showing same on a photograph).

Q. Does this forward end rest right at the edge of the nozzle?

A. Sometimes. It differs a little according to how it drops.

Q. It is liable to be an inch or two over or back? Mr. Sayers, what measurements were you requested to make?

A. I had no instructions how to make them.

Q. What was said to you about the measurements?

A. He told me to go down there and get the measurements of the spout.

Q. When had you been there before?

—. I was up and down there on an average of about eight times a month.

Q. Did you stop off there previously?

A. Yes.

Q. What for?

A. To work on the gasoline engine.

Q. Did you go up and look at the tank?

A. I always do. I never pass on a train but what I always look at the spouts and the amount of water in the tank.

Q. The last time you were there before these measurements did you make any examination of the uprights?

A. No sir. You can look from the side of the train and tell exactly how the spout stand.

Q. You cast your eye up to look at the spout as to how it hung?

A. Whenever I go to a place I notice everything particularly.

Q. What did you notice particularly on this occasion?

A. I noticed that the spout was hanging like the other spouts on the line.

Q. Did you get up and look at the uprights on which it was swinging?

A. No, sir, that was alright.

Q. When did you look at it before this time?

A. I couldn't tell that exactly. The pumpers are there every — day and sometimes every day. He always looks after things.

Q. How long before this time had you gone up on the platform and looked at the upright?

A. I was there before—probably eight or ten days.

156 Q. Before what?

A. Before the next time I was there that I speak of when I examined the spout—before the accident happened.

Q. You were there eight or ten days before the accident happened?

A. Yes, sir; then I was there once after that.

Q. That was when you went to attend to the gasoline engine and didn't get on the upright?

A. No, sir; you can see that from the ground. I notice everything—the chains and weights—how they hang.

Q. Has this upright to which the pulleys are attached and through which the chain passes which connects with the water-spout been elevated?

A. It hadn't been done that time.

Q. How do you know if you didn't get up there and look?

A. Because, being familiar with the spout, I could tell at a glance.

Q. How could you tell. Suppose it was elevated only a slight amount, would you notice that particularly?

A. If it were 3 inches I would notice it. When we examine a spout that way, I stand outside of the rail and of course notice. I am familiar with all those places, and, if you make a change of three inches in the spout, I can tell it.

Q. Why do you say three inches?

A. I think that amount I would detect.

Q. What difference would the elevation of that upright bar make in the angle of the spout?

A. It wouldn't make a great deal.

Q. How much would it change it? How much higher would it lift the spout? Here is the cross-bar on which the pulley is attached and the chains run through those and connect with the spout here and at the other end are the weights. Suppose you lift this bar up 3½ inches, what effect will that have?

A. It would pull the spout back five or six inches.

Q. Don't you know it would shorten the chains themselves 7 inches — the elevation of that bar 3½ inches?

A. That is what I say; it would pull the spout back.

Q. Wouldn't it shorten the chain seven inches, and wouldn't the spout be pulled back over a foot higher?

A. It might. I don't know the exact distance. It hadn't been pulled back at that time.

Q. How do you know it hadn't?

A. Because I noticed it after it was done.

157 Q. When was it done?

A. Eight or ten days after I made those measurements.

Q. Did you see it done?

Mr. WRIGHT: "I object to any change being shown after the accident occur-ed."

Mr. FITZHUGH: "It becomes absolutely necessary, in view of the direct examination of this witness, to show this fact, because Mr. Wright has asked him: Did you make this measurement before the change was made? The accuracy of the whole testimony depends on that."

Judge HAMMOND: What day of the month did you make this measurement to which you have testified?

A. It was along about the 3rd or 4th of September.

Judge HAMMOND: This accident happened on the 18th of August?

A. Yes, sir.

Mr. FITZHUGH: Do you know the date when these changes were made?

A. No, sir; I don't know the date, but passing there the first time after it was made I noticed the difference in the spout.

Judge HAMMOND: Did you make the measurements before you noticed the change?

A. Yes, sir.

Mr. WRIGHT: I ask that the details of the change in the spout be excluded. That what Mr. Sayers says about noticing changes made in the spout be excluded.

Judge HAMMOND: "I can't do that. That is the element by which he noticed the change. That he knows the measurements were made before he noticed those changes."

Mr. FITZHUGH: You said awhile ago, did you not, that you hadn't been there but once before you made those measurements since the death of Mr. McDade, and at that time you were simply there for the purpose of attending to this gasoline business and didn't get upon the platform or look at the upright at all?

A. I didn't say it that way. Whenever I go to a place, I look over everything, and, from the ground, I say see everything; whether it is al- right the same as getting up there.

Judge HAMMOND: At the time you made these measurements, did you notice any changes made in this structure as you knew it before?

A. If there were any changes, they were so slight I couldn't detect it.

158 Judge HAMMOND: It appeared to you at the time you made the measurements to be the same as it had been all along?

A. Yes, sir.

Mr. FITZHUGH: When were you there—after you took these measurements the first time you were there?

A. The next time was after I took the measurements.

Q. About how many days after you took the measurements, was it, that you went back there?

A. I couldn't tell exactly, sir; probably eight or nine days. I couldn't say at all. Somewhere in that neighborhood.

Q. Was that the time, eight or nine days after you took the measurements, that you say you noticed the change?

A. No, sir; I noticed it on the train in passing, but didn't stop off.

Q. When was that?

A. I couldn't give it.

Q. How many days after you took the measurements before you went back?

Mr. Wright again objected to this testimony, the — overruling the objection, exception being taken to said ruling.

A. It was probably two weeks, maybe more.

Q. Were you not there eight or nine days after you took the measurements? At Goodwin, Arkansas, after this change, after you took these measurements?

A. I am not certain. It would be somewhere about that time.

Q. Didn't you state further back that you went there eight times a month?

A. No, sir, but I pass there. I noticed those spouts every time I passed.

Q. You say that you passed there about eight times a month, didn't you?

A. Yes, sir.

Q. That would be about once every three or four days, wouldn't it.

A. I don't come in that way. Sometimes I will probably be working there today and I may have to go back two or three days and other times it would run ten days.

Q. How could you go there eight times a month in that way? Do you go there eight times a month?

A. I passed there. I have to come here to read the meters and have work to do at Hopefield and it average- about that, but it ain't distributed at regular times through the month.

159 Q. Have you any memorandum of your visit to Goodwin or the times you passed through there after August 18th?

A. No, I have no memorandum.

Q. What is the best of your knowledge and recollection as to the length of time after these measurements were taken that you either passed Goodwin or got off at Goodwin?

A. As I said, the next week.

Q. What is the next week after you took these measurements that you passed by there and noticed this change in this spout?

A. I don't think it was the first time after.

Q. Didn't you just state a little while ago that you went back there in eight or nine days after they were taken, but that you had noticed it when passing by before?

A. No, I didn't mean it that way, if I did. When I went back the first time after I took those measurements the spout was in the same condition it had always been. Or, if there was any change, it was so light I couldn't notice it.

Q. Did you examine it the first time you went back?

A. Yes, from the track, standing alongside of the rail and looking at everything around the tank to see that it was in shape, and some time after that, in passing on the train, I noticed it.

Q. When was this?

A. It would probably be two weeks, it may be a day or two longer.

Q. Have you any *distant* recollection, Mr. Sayers, about this matter at all, about the dates?

A. I have of the date I took the measurement.

Q. Outside of that date, you haven't any distinct recollection about it?

A. No, not that I could give the date.

Q. And you haven't about the time, the days or weeks any distinct recollection?

A. I can say I am certain it was 12 or 14 days after I took the measurements that I noticed the change.

Q. When were you there?

A. On the passenger train.

Q. Was your attention called to it by any one, or did you notice it yourself?

A. I always get out and notice the amount of water in the tank, etc.

Q. You say the date you took these measurements was Sept. 4th?

A. About that.

160 Q. Did you put it down?

A. I had a copy of the letter I sent to the foreman, but the valise was stolen.

Q. You said you made the measurements on September 4th?

A. I think it was on the 4th.

Q. Was Mr. Guy, the claim agent, there with you then?

A. He never was there with me.

Q. Did you make a memorandum of the measurements at the time?

A. Yes, sir.

Q. Have you them with you?

A. That was in the valise that was taken.

Q. When was that valise taken?

A. I can give you the exact date of that. I can't give it to you here.

Q. It was your valise?

A. Yes, sir.

Q. Don't you remember that date?

A. It was about the 6th or 7th of last month—December.

Q. When was the last time you looked at the memorandum you made of these measurements?

A. I never looked at them after I took them. The letter I wrote I kept a copy of it and I put it in this valise.

Q. You never saw this copy or the memorandum you made at that time or any other papers containing these measurements after that day you made them?

A. Yes, I saw the copy of the letter I wrote.

Q. The letter itself?

A. Well, yes, a copy of the letter I wrote.

Q. The copy of the letter you wrote was in this valise?

A. That is the one I kept, but I seen a copy of the one I sent away.
Q. When did you see that?
A. I saw it here in Memphis.
Q. Who showed it to you?
A. I asked to see it.
Q. Why did you ask to see it?
A. To refresh my memory on account of not having the other.
Q. When did you see it?
A. I saw it today.
Q. Was it in your handwriting?
A. No, sir.
Q. In whose handwriting was it?
161 A. I couldn't tell you.
Q. Then you were not shown the letter you yourself sent here, containing these measurements?
A. No, but I am satisfied this was a copy of it.
Q. Did you, before seeing this letter today, remember the measurements which you have given here before the jury?
A. Yes.
Q. Why did you want to see the letter?
A. So as to be certain.
Q. Did you carry those measurements in your mind from Sept. 4th until today without ever having seen the memorandum or letter containing the measurements?
A. Yes.
Q. Carry them in your mind all the time?
A. That is, I was more positive after seeing them, but I pretty near knew what they were. The one from the front of the spout, I remember that.
Q. But the rest you didn't remember?
A. Yes, I remembered, but I wasn't certain.
Q. You couldn't be certain until you saw this letter, could you?
A. I wouldn't swear positively to it on account I wouldn't trust my memory.
Q. Without seeing the copy which was furnished you, you wouldn't have been willing to swear positively to those measurements?
A. Only the outside measurements of the spout.
Q. The rest you couldn't swear positively to without seeing them?
A. I would not.
Q. You say this copy was in the handwriting of some one else?
A. Yes, but from my memory I am satisfied it was correct.
Q. You stated that you couldn't have sworn positively about them without refreshing your memory, didn't you?
A. Yes, sir.
Q. If they had been wrong; if the paper shown you was really not a copy of the other as to the measurements could you have corrected the measurements to the inch from your memory?
A. Well. I wouldn't like to do it. I took the measurements with a rule and it is liable to vary to what it would be, if you had a tape.

Q. If those measurements found by you on this paper
162 which was furnished you today had been wrong, could you, from your memory, have corrected those measurements?

A. Yes, I think I could, sir.

Q. Didn't you just now say you couldn't?

A. I would be more certain.

Q. Did you ask for your letter?

A. Yes.

Q. They didn't give you your letter?

A. They didn't have it, I believe.

Q. Who told you they didn't have it?

A. That is the one they showed me.

Q. You asked for your particular letter and they gave you one in some one else's handwriting?

A. I believe the way I asked was the statement I sent of those measurements.

Q. In your handwriting?

A. Yes, sir.

Q. And they gave you one in somebody else's writing, isn't that a fact?

A. Yes, sir.

Re-examination:

Q. You would recognize your own handwriting, wouldn't you?

A. Yes, sir.

Q. You ask- the claim agent to show you the statement and he showed you what you took to be a copy of the letter?

A. Yes, sir.

Q. If we get your letter from the files at the office, you can recognize it?

A. Yes, sir.

Q. You are satisfied this was a copy of yours?

A. To the best of my belief.

Q. In making the outside measurements you were asked about the slope. I will ask you if the slope of the spout—you say it was about twelve, should come off here——

A. Yes, to correspond with the measurements at the bottom I should think it would.

Q. If asked the slope of a nine-foot pipe, a part of which comes over the track that way, if you include this part here, that, of course, don't give you the slope of the rest?

A. No, that is, as I understand it, that wouldn't give the slope of the barrel of the spout.

Judge HAMMOND: "We can all understand that the
163 nearer this nine-foot pipe came down horizontally, the more dangerous it would be."

Q. Has the supply pipe of that tank, from the date that Mr. McDade was hurt up to the present day—has it ever been changed at all, or is it just as far away from the track as it was before?

A. It never has been changed. If it has, I don't know anything about it?

Q. Have you noticed that it is the same. Can you testify that it is in the same condition now that it was then—the goose-neck?

A. I am almost certain it is, but I never noticed that particularly, so I wouldn't swear positively.

Q. Who would know absolute whether it was changed or not in the service of the road?

A. Mr. Poole.

And further saith not.

Mr. F. A. LUCE, being duly sworn, testified as follows:

Direct examination:

Q. What is your name?

A. F. A. Luce.

Q. What is your present occupation?

A. General foreman, water service of the Choctaw road.

Q. You are general superintendent of the water service, are you?

A. Yes, sir.

Q. How long have you been in the service of the Choctaw, Oklahoma & Gulf R. R.?

A. About seven years.

Q. You were on the north end of the Choctaw?

A. Yes, sir.

Q. Now, did you have charge of the water service of that portion of the Choctaw road that includes the Goodwin tank?

A. Yes, sir.

Q. You had charge of that before Mr. McDade was killed?

A. I taken charge of that the 15th day of December, a year ago.

Q. Before you went with the Choctaw road, what road had you worked on and what capacity?

164 A. I worked on the Delaware road in the train department and the St. Louis and —— in the water service.

Q. You have been in the railway service all your life or nearly all your life?

A. Yes, sir.

Q. Does the water service comprehend and include the construction work and repair of tanks?

A. Not altogether in the construction. The construction is generally put up by the bridge and building department.

Q. But the repairs and all of that is under your observation and control?

A. Yes, sir.

Q. Did you know the Goodwin tank, the way the spout hung and all that, before Mr. McDade was hurt?

A. Yes, sir.

Q. The roads that you have been on, are they considered well-regulated roads or not?

A. Yes, sir, the first-class roads of the country.

Q. I wish you would state, from your experience as a railroad man, whether or not the sway spout upon the Goodwin tank was in such a condition prior to the death of Mr. McDade as that of tanks ordinarily used on well-regulated railroads in the United States?

A. Yes, sir, about the same.

Cross-examination:

Q. When did you inspect the Goodwin tank before the death of Mr. McDade?

A. I don't recollect the exact date, some time in June, probably the latter part of June or the first of July.

Q. You don't remember the date?

A. No, sir.

Q. What occasion did you have for inspecting it?

A. Simply looking to see that everything was in proper condition.

Q. Did you get off there?

A. Yes.

Q. What did you do?

A. Simply looked around and looked at the trains.

Q. How long did you stay there?

A. Well, sir, I couldn't say, something over two hours probably. I came in on the freight train and went out on the freight train.

Q. Did you get upon the platform?

A. No.

Q. You haven't seen it since then up to the time of his death?

A. Yes, I have seen it since then.

165 Q. Up to the time of his death?

A. No, sir.

Q. Have you seen it since then?

A. Yes.

Q. You say the matter of repairs and tanks would come under your supervision?

A. Yes, sir, the repairs.

Q. You say it was about like other tanks on other roads in June last?

A. Yes.

Q. How is it now?

To this question Mr. Wright objected.

Mr. FITZHUGH: This witness is placed on the stand for the purpose of showing that this tank and spout conformed to the standard or was like other tanks with reference to all its appliances on other roads. Now, for the purpose of showing whether a witness is right about that or not, I think we have a right to ask him whether or not the tank was changed. If, so, whether the change was such as to make it conform to the standard on other roads or whether before that change it was that way. In other words, not for the purpose of fixing negligence, but for the purpose of showing inferentially, if not directly, that it was not the kind used on other roads ordinarily, because, if we can show by him that it is standard as it is now and that a change has been made, it could not have been standard be-

fore. We ask the question solely for the purpose of testing this gentleman's knowledge of the character, not only of this tank, but to compare it with tanks on other roads, and to see whether or not—the test being what was its condition then, and inferentially we have the right to show that the witness could not be correct in that, because, if he were to say that any change of such a character as to be material were made, that it conformed previously to the standard of tanks used on other roads wouldn't be true.

Judge HAMMOND: "I take it you don't want to have this record infected with reconstruction. I have ruled it out and repeatedly ruled it out, and rule it out now, and say to the jury, as I said before, the Supreme Court of the United States has said that the fact that a change has been made in construction of the railroad company *are* irrelevant and immaterial, and from it the jury cannot be allowed to imply that the company was guilty of negligence in the prior construction because they better the construction since the accident occurred. But, notwithstanding that opinion, it has been my opinion, and I have frequently ruled that where the elements
166 that enter into the alleged defect are of a character that makes it necessary to inquire into the changes, then, if made for that purpose, the inquiry may be made. The other witnesses couldn't fix by dates, he couldn't fix whether his measurements were made before or at what date they were made so that we can tell from dates what was done, and, being a man who was familiar with the tank itself, and familiar with its construction and operation, I allowed him to say whether or not these measurements were made before or after the changes which he had observed in the construction. For that purpose I admitted it. I do not see any such purpose here, and I will sustain Mr. Wright's objection.

Mr. Fitzhugh excepted to the ruling of the court.

Q. Did you make a change in this tank and spout in the elevation of it after the death of Mr. McDade?

A. No, sir.

Judge HAMMOND: I ask you, Mr. Luce, what is the ordinary construction of these tanks in reference to the position of the sway pipe after it has been used to put water in the engine?

A. That is the hanging of it.

Judge HAMMOND:

Q. In care of it and in its position after it has been used, how does the ordinary construction take care of the sway pipe to keep it from sweeping people off the cars?

A. The sway pipe is hung with two chains that run over the pulleys with weight. As soon as the fireman gets through taking water he throws it up and the weights pull it back and it hangs at an angle anywhere from 24 to 30 degrees in a slanting position.

Judge HAMMOND: What are the rules for the construction about throwing it up with relation to any collision with passing cars?

A. The different roads have different standards. It depends on the engine.

Judge HAMMOND: You said there was an ordinary standard. I am asking you for the ordinary construction in your well-managed railroads.

A. The weights are designed to carry those spouts back away from the cars.

Q. And they ordinarily are constructed so as to be entirely free from any danger or contact with the cars?

A. Yes, sir.

Mr. FITZHUGH: That is the way they are used ordinarily on all roads so that, when not in use, they clear the car and the brakeman riding on it?

167 A. Yes, sir.

Q. The brakeman are supposed to ride either standing or sitting on the edge of the car?

A. It depends on circumstances.

Q. They do do that?

A. Yes, sir.

Q. And they are so constructed that a brakeman sitting on the side of the car—that the sway pipe will swing back so it will clear the car with a person on it?

A. Yes, sir.

Q. That is the way they are ordinarily constructed on all roads. Would this sway pipe at Goodwin tank clear a man on the car in an ordinary position?

A. I believe so.

Q. Did you ever make a test of that?

A. Not a personal test.

Mr. WRIGHT: Did you ever make a test on other roads?

A. I have rode by them on cars and this was in the same position as near as I can tell.

Mr. FITZHUGH: If the angle is twice as much as you say it is, you would be mistaken about that?

A. If the angle was twice as much, but——

Q. If it hung at 40 degrees instead of 24 or 30 degrees, it would have been such as to strike a man on the edge of the car?

A. Yes, that would be the same as dropping it down. The further down you drop it the more it comes over the car.

Q. If, instead of the angle being 24 to 30, it dropped down to 40 degrees, it would strike a man sitting on the eaves of the car?

A. It would depend on the height of the cars.

Q. Suppose it is a furniture car?

A. I don't know the dimensions of those cars.

Q. Suppose it is 13 feet high and a man sitting on it would be two and a half.

A. He might lean out far enough to hit it.

Q. You don't know how it would be if it was at an angle of forty degrees?

A. Not exactly without making a test.

Judge HAMMOND: This structure of chains and weights is done to make that spout go up automatically?

A. When they turn it loose it is thrown back.

Judge HAMMOND: Is it the ordinary construction of those chains and weights that this automatic action will carry the spout perpendicularly?

A. There is one way—if the weights drop off the platform, it will take it.

168 Judge HAMMOND: They are not constructed perpendicularly—will you tell me why?

A. Because it would be too hard for the firemen to pull them back.

Mr. FITZHUGH: That depends on the distance the structure is from the tank?

A. No, sir, if you have a spout perpendicular with those heavy weights, it is almost impossible to pull it down.

Q. That is the way they hang ordinarily (showing witness a photograph), practically perpendicularly?

A. No, sir, that is too straight for the general average of sway pipes.

Q. Don't you know, in a great many of the roads, the pipe will lay, when not in use, up against the tank?

A. That would be a faulty construction of weights getting off the platform.

Q. Isn't it a fact, in ordinary use on other roads, the length of the chain and weights are of such a character as to pull it back up practically in a perpendicular position?

A. Not in proper position. No, sir, they are always left at an angle of 22 to 30 degrees.

Q. What is the length of this chain on this spout at Goodwin?

A. I never measured it. I couldn't say.

Q. Don't you know about how long it is?

A. No, sir.

Q. The chain connected with the under side of the spout—the hand chain?

A. 23 inches—the handle chain.

Q. Did you measure that?

A. Yes, sir.

Judge HAMMOND: What is the length of these chains that run over the pulleys.

A. They vary according to the size of the sway spout, and where the ring or sway spout is hung.

Q. Ordinarily how long ought they to be?

A. Some of them are 12, 14, 16 feet. I have seen them 24 feet.

Q. How should this sway pipe hang?

A. Something about 12 feet. I have no accurate measurement.

By Mr. WRIGHT:

Q. Mr. Luce, you speak of 24 feet. Explain that.

A. It is a variation in the construction of different tanks. In what we call double-height tanks the chains would be 24 feet long.

169 Q. This photograph I hand you is one of the tall ones?

A. Yes, sir.

Mr. FITZHUGH: What is the size and weight of this 23-inch chain attached to the under side of the spout?

A. I should judge it is made of what we call quarter-inch iron.

Judge HAMMOND: How does it compare with an ordinary trace-chain?

A. About the same.

Mr. FITZHUGH: 23 inches long with a ring in it?

A. Yes, sir, ring and all.

Q. What is the diameter of this ring?

A. I should judge it is probably close to three inches, probably two and a half.

Q. The chain proper is 20 inches long, and with a ring 23?

A. Yes, sir.

Q. That is the way it was?

A. I never knew of any change being made in the chain that I know of.

Q. At what part of the pipe is that chain attached—to what part?

A. About the center, I should judge from the looks of it. Probably a little above the center.

Q. Is it attached to the same band that goes around the spout?

A. Yes, sir.

Q. That is about the center of the pipe?

A. Very near.

Q. How far does that spout project over a car—a furniture car?

A. I couldn't say. I don't know the dimensions of it.

Q. What is the length of the spout?

A. If I am not mistaken, that spout is 8 foot ten.

Q. Does that include the crook?

A. On the outside—you mean the top of the crook?

Q. Did you make that measurement yourself?

A. Yes, sir.

Q. How did you measure it?

A. I measured from the top of the crook down to the bottom of the spout.

Q. You measured from right there, did you? (Illustrating with photo.)

A. Yes, sir.

Q. You measured from the top of this nozzle right there?

A. Yes, sir, from here to there over the center down to the bottom.

Q. That gives the length of the pipe?

170 A. That gives the length from the top here down to here.

Q. From the top of the pipe right there to this end through the center?

A. Yes, sir, I put a line on this center.

Q. You didn't run around to the nozzle, but to the center of the pipe?

A. Yes, sir.

Q. That would be 8 feet ten inches?

A. I think that is the measurement.

Judge HAMMOND: Can you tell us, in the ordinary construction

of these sway pipes, how far the band which holds the chains and to which the chains are attached is put to the lower end of it?

A. They generally hang near the center, if possible, on an eight-foot-ten sway spout.

Q. If they put it below the center, it will sway this way, and if above, it will pull it too far back?

A. Yes, sir.

Mr. FITZHUGH: State where the band on that pipe is located practically. (Handing witness a photograph.)

A. It looks to be about two-thirds up on that spout.

Q. That pulls it nearer a vertical position, doesn't it?

A. Yes, sir.

Q. In other words, about one-third the distance from the top of it? On the one at Goodwin you say the band is about the center of the pipe?

A. Yes, sir, I should judge about the center.

And further saith not.

W. W. SHERWOOD, being duly sworn, next testified as follows:

Direct examination:

Q. What is your name?

A. W. W. Sherwood.

Q. What is your business?

A. Passenger conductor on the Choctaw, Oklahoma & Gulf.

Q. How long have you been in the service of the Choctaw, Oklahoma & Gulf?

A. Since last December a year ago.

Q. You were in the service of the Choctaw some time prior to the 19th of last August, when Mr. McDade, I believe, was killed?

A. Yes, sir.

171 Q. I wish you would state how long you have been in the railroad business and with what roads.

A. I have been running a train since 1880 with about two years excepted.

Q. Before that were you in the railroad business?

A. In the office, yes, sir.

Q. What roads have you been with?

A. The Missouri Pacific, Iron Mountain, Texas Pacific and this road.

Q. State whether or not, as a conductor, running upon trains, are you familiar with the angle at which sway-pipes hang towards a track. That is, with the eye. I don't mean the exact measurements. Are you familiar with the way they hang with reference to the track as you pass?

A. Yes, sir.

Q. I wish you would state whether or not you were familiar with the Goodwin tank prior to the accident that happened to McDade.

A. Well, I had never heard anything about it.

Q. Did you know the tank?

A. Oh, yes.
Q. You passed there how often would you say?
A. Passed there six or seven times a week probably.
Q. Part of that time would be in the day and part in the night?
A. Yes, sir.
Q. Did you make a round trip from Memphis to the end?
A. I go from Memphis to Booneville, make another trip and then north to Little Rock.
Q. Goodwin is between Memphis and Booneville?
A. Yes, sir.
Q. I wish you would state whether or not the tank at Goodwin—the spout is the same character of spout with regard to the way it is constructed—state whether the character of sway-spout on Goodwin tank was, prior to the 19th of August, that ordinarily used on well-regulated roads through the country—those upon which you have run.
A. Yes, sir.
Q. It was?
A. As far as I would notice those things, being a conductor on the train. It was just the same as any of the other spouts on the road.
Q. What about other roads—well-regulated roads—about the same?
A. Yes, sir.
172 Q. You did notice, as you passed, with your eye, the spout as it hung?
A. Yes, sir.
Q. Mr. Sherwood, were you the conductor upon the train that picked up Mr. McDade?
A. Yes, sir.
Q. You were on the passenger?
A. Yes, sir.
Q. About what time did you pass the point where you picked him up?
A. I made a notation in my train book—3.34 a. m., August 19th.
Q. I wish you would state what was the position of Mr. McDade when you found him.
A. He was lying on his right side with his head doubled underneath and full of blood. He was facing the west, his back towards the east.
Q. That is, his head was towards the west?
A. His face and most of his body was towards the west.
Q. Now, I believe it is admitted that there is a spur track there. Could you give a little drawing to the jury, not an accurate sketch, but just show how he was lying?

Witness drew said sketch.

A. There is the station-house and there is the tank. Down here there was a side track.
Q. Explain that drawing to the jury.
A. That is supposed to be the platform and here is the tank.

This is the man here. Out here a little way is the side track and we found the body lying in that position with his feet very near the ties of the main track—the ties were about that far from the road, and his feet were very close to the end of the ties—about from the rail would be 2 feet maybe.

Q. How far from the tank?

A. I put it down in my book about 675 yards.

Q. What is the distance from this track to that track where the body was found?

A. The distance between this track and that, I suppose, is eight or nine feet. I wouldn't be positive.

Mr. FITZHUGH: State how far his head was from the cross-ties of this side track.

A. Three feet or more and his head was in that shape.

JUROR: How far from the ties of this track?

A. Three or four feet.

Mr. WATSON: What was the character of the ground?

A. It hadn't been raining. It was dry and hadn't been raining for a long while and was pretty nearly dusty—it was smooth—I noticed that particularly.

173 Mr. WRIGHT: As I understand you, he was lying between the spur track and the main track?

A. Yes, sir.

Q. His feet was very near the cross-ties on the main track, how near would you say were his feet to the end of the cross-ties?

A. I suppose about 6 or 8 inches.

Q. His head was three or four feet from the end of the ties on the side track?

A. Yes, sir.

Q. His face was toward the west and his back toward the east?

A. That is right.

Q. He was lying upon his right side and his head was doubled underneath his body?

A. Yes, sir.

Q. Describe what injuries you saw on his face.

A. All I saw was just blood.

Q. Did you notice anything with regard to any bruises on his right side?

A. I didn't notice those at all. I went immediately to the express messenger and got his cot and they put the man on it.

Q. You say you didn't notice the marks on his face?

A. No, sir.

Judge HAMMOND: He was dead when you got to him?

A. I thought—I am very nearly positive that I saw him breathe twice, and made the remark to the men to be in a hurry and get him to Forrest City as quick as they could for medical aid.

Q. He never spoke, did he?

A. Oh, no.

Q. As you passed the Goodwin tank did you notice the condition of the tank about the spout?

A. I did not.

Q. You didn't notice that?
A. No, sir, I went right back in the baggage car.

Cross-examination:

Q. Did you ever run a- brakeman on any other road?
A. No, sir.
Q. You have been conductor of a passenger altogether on that system?
A. No, I run a freight train over there.
Q. These spouts are ordinarily constructed on all the roads so that when not in use they will swing back so as to clear the cars and persons sitting on the side of them, are they not?
174 A. Yes, sir.
Q. Did you ever give any particular attention to this tank there?
A. No, sir.
Q. Just simply glanced at it when you would go through?
A. Yes, sir.

Re-examination:

Q. A man leaning out over the side of the car could get hit by any obstruction near enough? He could be hit by any obstruction near enough to strike him?
A. Yes, sir.
Q. You were speaking about a man sitting naturally on the car?
A. Yes, sir.
Q. Mr. Sherwood, have you had any familiarity in your experience as a railroad man with persons falling off of cars or being knocked off?
A. Some, yes, sir.
Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car and was sitting on the north side, facing north, throwing his body in this position in which I am sitting facing north, the car going west, and the tank spout being situated on the north. If he were struck by that spout, would you say, from your familiarity with people being knocked off of trains and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank, where the spout hit him, that he could have been knocked off by the spout?

Mr. FITZHUGH: I object to that on the ground that it calls for the opinion of the witness as to the exact issue to be tried by the jury, and that, from the very nature of the case, it is not such a question as the witness could know about or take away from the jury.

Judge Hammond sustained Mr. Fitzhugh's objection, and to the ruling of the court counsel for defendant excepted.

Mr. WRIGHT: I would like to repeat the question with the element in that the train was going 25 miles an hour.

To this Mr. Fitzhugh objected, Judge Hammond sustaining said objection, and to the ruling of the court defendant's counsel duly excepted.

And further saith not.

175 And ROBERT CHURCH, being duly sworn, next testified as follows:

Direct examination:

Q. What is your business?

A. Engineer.

Q. Mr. Church, you were the engineer on the train Mr. McDade was on at the time of his death?

A. Yes, sir.

Q. Have you been sworn?

A. Yes, sir.

Q. State how long have you been in the service of the Choctaw, Oklahoma & Gulf.

A. I have been employed by the Little Rock and Memphis and also the Choctaw & Gulf since they taken charge since October, '92.

Q. In the course of your employment, without going into the question, you have run over the road, I suppose, hundred- of times?

A. Yes, sir.

Q. Mr. Church, you were the engineer upon the train that Mr. McDade was killed on?

A. Yes, sir.

Q. Before you got to Goodwin tank, did you receive any signals from Mr. McDade or from the head brakeman?

A. Yes, sir, I received a signal from the caboose and one from where his lamp was found—supposed to have been him—should have been him.

Q. You received one from the head brakeman whoever that was?

A. Yes, sir.

Q. What was that signal—to do what?

A. He signaled me to go ahead when I whistled for the station. It was for me to go ahead.

Q. In other words, not to stop at Goodwin?

A. Yes, sir, no need to stop unless I wanted to on account of the engine wanting something.

Q. You whistled—gave the whistle?

A. Yes, sir, I gave a long blast approaching the station.

Q. As you passed the Goodwin tank did you notice the position of the sway-spout?

A. Only of the water-spout—yes, sir, I noticed it was up in proper place as usual.

Q. I will ask you this—whether or not that spout, according to the usual spout in its construction and the way in which it hangs of other tanks upon the road?

A. Yes, sir.

176 Q. Did you ever work on any other roads?

A. Yes, sir, on the Fort Smith from Little Rock to Van Buren, I broke and fired there before I came to the Little Rock and Memphis.

Q. Comparing this spout with spouts on those roads, what was the character of that spout?

A. It was the same, in my judgment and knowledge.

Q. Do you have occasion in your business as engineer and as part of your duties as engineer, running an engine, to notice spouts and other objects that tend towards the track, bridges and things of that sort?

A. Yes, sir, it is an engineer's duty to look out for obstructions ahead.

Q. And to look out to see whether or not the spout was down and all that?

A. Yes, sir.

Q. In other words, you look all over your right of way?

A. Yes, sir.

Cross-examination:

Q. Mr. Church, you say that this night when you passed Goodwin you received from the head brakeman the signal to go ahead?

A. Yes.

Q. And the head brakeman on that train that night was Mr. John I. McDade?

A. Yes, he was acting in that capacity that night and had been.

Q. You saw the lantern waving from the side of the car?

A. Yes, sir, the lamp wasn't down on the side, it was from the top, the edge.

Q. The eaves of the car?

A. Yes, sir.

Q. The lantern was really out from the car waving—you could see it?

A. Oh, yes, I seen it by leaning out of the side window as usual. A person has to lean out part of his body from the engine to see back to the caboose, and I saw this signal clear back to the caboose.

Q. You saw this lantern being waved by the head brakeman just beyond the edge of the car?

A. Yes, sir.

Q. On the same side you were on?

A. Yes, sir.

Q. Did you blow for Goodwin that night?

A. Yes, sir, I did, I blowed one long blast of the whistle.

177 Q. Where did you blow this blast?

A. I was not quite to the half-mile board—which would make it about half a mile to the station.

Q. How long would you say the blast was?

A. Of four or five seconds' duration.

Q. And the proper course was the conductor would give the signal to the rear brakeman and the rear brakeman would transmit it to the head brakeman, and he would give it to you?

A. Yes, sir the signal passed from the caboose to me. I received the — along down the line.

Q. The last one to give the signal would be the head brakeman, who was nearest to the engine?

A. Yes, sir.

Q. And was that Mr. McDade?
A. Yes, sir.
Q. At what rate of speed were you running that night?
A. Well, sir; I wasn't running over 20 miles an hour, between twenty and twenty-five.
Q. When you got this signal, you knew that meant to keep right ahead, and didn't slack up at all?
A. That meant al- right, to go ahead, if I wanted to.
Q. You didn't expect to take water that night at Goodwin, did you?
A. No, sir.
Q. And you got this signal to go right ahead just before you got to the tank, didn't you?
A. In a half a mile of the tank, yes sir.
Q. You were going at 20 or 25 miles an hour and the conductor had to give it first?
A. Yes.
Q. The conductor in the caboose gave the signal to the rear brakeman and the rear brakeman gave it to the head brakeman?
A. Yes, the signal was given by each one of them 'long about the same time, there was no interval from the time the conductor gave the signal until he gave it. All the lanterns were swing at the same time.
Q. They couldn't have started at the same time?
A. You might say the same time. When a man is looking back for signals it don't take him no length of time to wave his hand.
Q. It does take some few seconds?

Judge HAMMOND: There is no appreciable time.

Q. You say you got these signals about the same time.
A. From each and every one about the same time.
Q. You knew that you had to go ahead?
A. That everything was al- right behind.
178 Q. Then what did you do?
A. I just let the train roll along through the station.
Q. It was going at the same rate of speed—you didn't slack up any?
A. I didn't set no brakes or anything to slack the train but after you blow off steam the train don't roll up hill as fast as if you were working steam all the way through.
Q. Wasn't this a level place?
A. There is a little upgrade there.
Q. West of the tank?
A. No, east of the tank up to the tank and a little beyond.
Q. You were running at the time you passed Goodwin tank between twenty and twenty-five miles an hour?
A. Yes, between twenty and twenty-five miles an hour when we passed Goodwin tank.
Q. After you received these signals you paid no further attention to the matter—you knew that you were not going to stop and not going to take water?

A. Yes, sir.
Q. You knew before that you were not going to take water?
A. Yes, sir.
Q. What kind of night was this?
A. It was a clear night. It wasn't bright moonlight, some mist, but the night was clear as I remember.
Q. Was it a moonlight night at all?
A. Not a bright moonlight.
Q. Was the moon shining at all?
A. No, I can't say it was shining—it was dim at times.
Q. What was dim at times?
A. The moon; the light.
Q. Did you see the moon that night?
A. I never paid any more attention to the moon that night than I did last night.
Q. Can you say whether the moon was shining at all or not?
A. It was a clear night and the weather was clear.
Q. Don't you know it was misty?
A. No, sir; I do not. I know positive it was not misty.
Q. You do?
A. Yes, sir.
Q. Why do you know that so well?
A. If it had been misty, I would have noticed it.
Q. If the moon had been shining, wouldn't you have noticed that, too?
179 A. No, I didn't have no occasion to notice the moon. I didn't run by moonlight. I had a good electric headlight.
Q. You say that you looked up at this spout?
A. Yes, I taken notice of the spout before my engine got to it.
Q. Why?
A. For the reason that if it had been hanging down it would have struck my engine.
Q. Was that the only reason you noticed it—to see whether it would strike your engine or not?
A. No, sir.
Q. Why did you notice it?
A. Because if there is any obstruction or anything out of the way I stop and fix it or report it.
Q. Were you looking out for spouts that night to see if they were in proper condition?
A. No more that night than any other night. The engineer's duty is to look out for all obstructions.
Q. I am asking whether you paid any more attention that night than you did any other night, and wasn't it just simply to see whether it would strike your engine or not?
A. No, it wasn't simply to see that.
Q. What angle was it hanging at that night?
A. So far as the angle is concerned, I have never measured any angles. These tank-builders can tell you the angle the spout hangs in.
Q. Have you any idea at all how it was hanging?

A. It was hanging up to the proper place with the weights down.

Q. Did you see the weight that night?

A. Not particularly, but the spout was hanging up as usual. From observation passing along I saw it would clear my engine and train.

Q. Do you know how spouts are intended to hang on other roads? How they are constructed? Are they so constructed that they will clear a car and brakeman sitting on the side of it?

A. They all hung similar with weights and chains.

Q. When not in use, how are they constructed with reference to hanging back so as to clear the car? A person sitting on the side—are they constructed so they will clear the car and person sitting on the side or not?

A. Yes, sir.

Q. A great many or most of the roads, hang in a vertical position, do they not? Kinder perpendicularly? Some of them go up against the side of the framework or against the side of the tank?

180 A. I have never saw them hung up that way yet. Instead of hanging straight up, they hang in an angle like that.

Q. What angle?

A. What I mean is it hangs in that position, hangs up to clear the train, all cars and everything. Then, by means of a rope or chain in that position, a fireman can reach it. If it was hung straight up it couldn't be reached by the fireman.

Q. What was your engine number that night?

A. No. 17.

Q. What kind of an engine was it?

A. An eight-wheel, locomotive engine.

Q. I know that, of course. What is the height of your cab?

A. I suppose the cab is 13—near 13 foot—something like that.

Q. That is from the top to the rail?

A. From the eaves of the cab to the rail.

Q. You lean outside to receive the signals, do you not?

A. Yes, you have to lean out a portion of your body.

Q. Were you leaning out from the right side that night?

A. Yes, sir; that was the side I was placed on—right next to the tank.

Q. In order to give you the signal the head brakeman gave it from the same side you were on?

A. Yes, sir.

Q. He was in the right position to give you the signal?

A. Not when I passed the tank, He gave me the signal when I was a half a mile away from the tank.

Q. He was in position to give you the signal, then, wasn't he? Didn't you state he gave me the signal that was the right position.

—. ——.

Q. After he gave the signal, did you still keep your head out?

A. No, sir.

Q. What did you do?

A. I looked ahead through the front window.

Q. You looked ahead after you received the signal?

A. Yes, sir.
Q. And continued to do that right straight along?
A. Yes, sir.
Q. After you had received your signal you kept your face right to the front, looking through the front window—right straight along—all the way?
A. Yes, sir.

181 Re-examination:

Q. How far ahead or about how far does that electric headlight throw a light?
A. It throws a light for near three-quarters of a mile ahead plainly.
Q. Would that electric light illuminate the tank?
A. Yes, sir; it would; all around.
Q. The headlight is up high on the engine, isn't it?
A. Yes, sir; up above the boiler.
Q. Does that headlight throw some light up, too?
A. Yes, sir.
Q. Would that illuminate the tank so that a person standing or sitting on the car could see the tank?
A. Yes, sir; if he had been looking in that direction, he could have seen the tank from the caboose.
Q. From the caboose which is at the rear of the train?
A. Yes, sir.

Recross-examination:

Q. The duty of the engineer when not receiving signals from the brakeman or conductor in — rear is to keep his eye on the track, isn't it?
A. Keep his eye on the track for all obstructions.
Q. You have your eye on the track—that is where you are looking for obstructions?
A. I am looking for obstructions around any water tank and around any station. All obstructions at every station or crossing.
Q. Do you have any distinct recollection as to how that spout hung that night?
A. It was hanging in the proper position to the best of my observation, passing there on the engine. If it had been hanging down any way unusual, it would have struck my engine first because the cab on the engine is wider than a box car.
Q. It isn't any higher?
A. It is higher than small cars.
Q. How wide is the cab of your engine?
A. I don't know the width of that. The master mechanic can give you that. I won't give it. I don't know the exact width.
Q. Why do you say it is wider than the car?
A. I will tell you my reasons. In switching cars you can set one car in on a track and shove another by it, but when you come

to the engine your cab won't clear it. That is the reason I say a cab is wider than a car.

Q. With any kind of car?

182 A. No, cars vary. You can take these big show-cars and circus cars. They project out further.

Q. What is the width of furniture cars—how far over the rail beyond the rail does a furniture car extend?

A. There is different sizes of them—they vary in width.

Q. What is your idea of the width of a furniture car as compared with the width of your cab?

A. As I say, I don't know the exact width of my cab and, as far as that is concerned, you will have to call on a car-builder to testify to the width of a furniture car.

Q. Do you say the cab of your engine was wider than any car you had in your train that night?

A. Yes, for they were all ordinary cars.

Q. How do you mean all ordinary cars?

A. That is the width.

Q. All about the same width?

A. Yes, sir.

Q. How do you know that?

A. From observation, going down the train when we went to look for this man at Brinkley—there was no unusually wide cars.

Q. All ordinary box cars?

A. They were all box cars, yes, sir.

Q. You know what are called box cars?

A. What is called box cars and flat cars, yes, sir.

Q. Don't you know certain cars are called box cars and some furniture?

A. Yes.

Q. These in this train were all box cars?

A. A furniture car is a box car, too.

Q. Don't you know they are designated differently?

A. Only difference is they are built a little larger to carry furniture.

Q. You say in this train they were all about the same width?

A. Yes, sir.

Q. Don't you — some were a foot wider than others?

A. I know this one his lamp was found on wasn't wider than the one ahead or behind.

Q. Did you measure it?

A. I was there and saw it standing—one in front and one behind and this between. We looked at the car and examined to see if there were any signs of a man getting hurt on top or falling between.

Q. You say you know positively this car on which his lantern was found wasn't wider than the one behind or in front?

183 A. Yes, sir.

Q. What kind of car was behind?

A. A box car.

Q. Was it a furniture car behind it?

A. No, sir.
Q. Was a furniture car in front?
A. No, sir.
Q. Are you positive of that?
A. Yes, sir.
Q. You know there wasn't a furniture car either in the rear or front of this car on which this lantern was found?
A. No, sir.
Q. There was not?
A. No, sir.
Q. You are positive of it?
A. Yes, sir.
Q. You are just about as positive of that as of everything else you have testified to, aren't you—because you looked at it?
A. Yes, we went back and looked at it.
Q. You are just as positive that there wasn't a furniture car connected with either end of the car on which Mr. McDade's lantern was found as you are positive that the water-spout was in proper condition?
A. Yes, sir.
Judge HAMMOND: Where did you first miss him?
A. At Brinkley.
Judge HAMMOND: How far is that?
A. Between ten and eleven miles.

Re-examination by Mr. WRIGHT:

Q. I omitted to ask you one question. I understood you to say that you examined the car upon which you found Mr. McDade's lantern?
A. Yes, sir.
Q. What examination did you make of it?
A. We went back when we missed him and examined the car, as I stated, to see if there was any blood or signs of his being killed on the car. There were no signs of his being killed on the car. There were no signs at all whatever.
Q. Did you have a torch?
A. Yes, sir; I taken a torch from the engine.
Q. Did you examine on top of the car a-d eaves?
A. Yes, sir; I got up on top of the car.
Q. Any blood there?
A. No, sir.
Q. Any signs?
184 A. No, sir; no finger-prints or anything on the car.
Q. You said the front part of the car—he was sitting on the front part?
A. I suppose so.
Q. His lantern was there?
A. Yes, sir.
Q. You examined between the cars?

A. Yes, sir; I thought perhaps he might have went across. That was our reason for examining.
Q. You examined from the ground to the top of the car?
A. Yes, sir.

Recross-examination:

Q. How was that car painted?
A. I don't know about the color. It was a dark color, dirty color.
Q. Reddish brown, wasn't it? What color was it?
A. A dirty color—more of a dirty color than anything else.
Q. A black, was it?
A. You might say kinder black, the color of dirt, cinders, smoke and such as that accumulated on a car from being in use.
Q. You don't know what the real color of the paint was—it was painted on top?
Q. It was an old black dirty color—dirty on top.
Q. Was it an old car?
A. It wasn't no newly painted car.
Q. Kinder a black color on top?
A. A little black—dirty color.
Q. How long were you up there?
A. I suppose we were up there some five minutes looking at it.
Q. Making the same kind of examination up there that you made about the cars on each side?
A. No, I spent more time examining there; if there was signs of him getting hurt on the car.
Q. You made a thorough examination, as you stated a little while ago, and were positive from the examination that there was no furniture car on each side of this car?
A. Yes, sir.
Q. You made this examination at the same time?
A. Yes, sir; at the same time we were back there. When we were back there examining, I taken notice of the cars in the train.
Q. You were noticing about the different cars on each side—who was with you?
185 A. Conductor Hollwell.
Q. Who got up first?
A. He got up first and I followed with my torch. I had my light and he had his lantern.
Q. Didn't Mr. Kennedy go up there before you did?
A. No, he was back in the caboose and went up afterwards and got Mr. McDade's lamp I suppose. Some one got it.
Q. Did you see the lantern up there?
A. I saw a lantern up there, yes, sir.
Q. Where was it?
A. Sitting right in the hand-hold, the hand-hold on top to come up the ladder.
Q. What is that hand-hold for—a grab-iron you call it?
A. Yes, sir.
Q. Finish your answer?

A. It is there to enable a man when he gets down to reach up and pull up.

Q. How far from the eaves — car is that?

A. I suppose six or eight inches. I didn't take no exact measurements.

Q. And the lantern was on the side of the hand-hold?

A. Inside of it, yes, sir.

Q. Which side?

A. The hand-hold is here and the lantern was sitting in here on the inside of the hand-hold.

Q. Was it nearer the eaves than the rest of the car?

A. Yes, nearer the eaves.

Q. And in a place there for it?

A. No, I never saw car yet where there would be a place for a lantern to set up there.

Q. Don't you know if the lantern was just sitting right on the car with no place there made for it that it would be knocked off, if it were left there?

A. No, I don't.

Q. You do not?

A. No.

Q. You are positive there was no little place there made for it?

A. There was a kind of place in it but I don't suppose it was made there for a lantern to be put there. It is a place so that a man can put his foot there and brace himself in setting brakes. A thing can be made for one thing and you can make it answer a dozen purposes.

Q. Was his lantern in that place?

A. Yes, sir.

Q. Was it round or not?

186 A. Yes, there was a little circle in it.

Q. How large was this circle?

A. About 8 inches, maybe less than that. Just so the bottom frame of the lantern will fit in al- right.

Q. I thought you said just now there was no such place?

A. I said it wasn't made on top of the car for that purpose.

Judge HAMMOND: He said it could be used for that purpose. I didn't understand the other witness to say that it was made for that purpose, but that the brakeman used it.

Q. What kind of a lantern was that?

A. A lantern that the company furnishes them.

Q. What kind was it?

A. It was an oil lantern, burned oil in it. To give you a full description of it I can't do it.

Q. Do all of them have the same kind of glass, the same color?

A. All white globes. They have different-colored globes and all that, some green and some red. This was a white lantern. Showed a white light.

Q. Mr. Church, how far did this spout hang that night from the eaves of your cab?

A. It cleared the eaves of my cab, I suppose, a couple of feet.

Q. You saw it and saw it hanging there that night and it was about two feet above the eaves of your cab?

A. Yes, it cleared my cab two feet, it cleared my cab two feet or more. I noticed it as I passed by. So far as taking any exact measurements I never did when my engine was standing still.

Q. To the best of your knowledge, you say that it cleared your cab about two feet?

A. Or more. Two feet or more.

Q. Was it two feet or more?

A. It was two feet or more, more than two feet.

Q. How much more than two feet? Was it two feet?

A. Over two feet.

Q. It might have been a little — than two feet?

A. No. That is only two feet. You can say that clock is four feet from *from* one column to another. That is just your guess and observation.

Q. Then that was your observation that night in looking at that spout that it cleared your cab about two feet?

A. Two feet or over, yes, sir.

Q. Was it your observation that it cleared it about two feet?

187 A. It cleared my cab not less than two feet, and perhaps more. Now, that is my answer.

Q. Perhaps more?

A. Yes, I said not less than two feet.

Q. Couldn't it have been less than two feet?

A. No.

Q. Why?

A. Just as I say it is all of two feet.

Q. Mr. Church, getting right down to it, you say it might have been two feet. Do you pretend to tell this jury you are able to say that this spout positively did not hang an inch less than two feet?

A. If it comes to any measurement, if I had stopped and measured, I could have — positive and exact within a fraction of an inch.

Q. Why is it you state so positively it was not less than two feet and then say perhaps it might have been more. It might have been less than two feet, might it not?

A. I told you the reason I said two feet was just from observation.

Q. From your observation it was probably two feet?

A. Yes, sir; and over two feet.

Q. Was it over two feet or not?

A. I can't say how much over.

Q. Can you state to this jury that it was over two feet?

A. No, I can't say exactly how much over two feet. I say from observation it was two feet or more than two feet.

Q. Then, from your observation, it might have been a little less than two feet.

A. It is possible it was and possible that it was over three feet.

Q. Do you say it was over three feet?

A. There is just as much probability of its being three feet as there is that it was less than two feet.

Q. You have no definite idea how it hung?

A. No, it hung up in its proper place.

Q. What did you start to say?

A. I am positive that tank spout was hanging in its proper place.

Q. That is all you are positive about?

A. Yes.

Q. What was the proper place with reference to the eaves of your cab?

A. Well, it cleared the cars a certain distance—it cleared them two feet or over, just from general observation.

188 Q. And that is all you can say—it cleared it two feet or over?

A. Yes, sir.

Q. You don't know how much over or how much less?

A. No, if I had taken measurements and measured the car, I could have told you within a fraction of an inch.

Q. You were not paying any particular attention to it?

A. Yes.

Q. Were you paying particular attention that night?

A. Yes, when I passed by there.

Q. Paying particular attention that night to that particular tank?

A. That one as much as all others. I found the spout hanging down once, and, if that spout had been down like I found it, it would have hit my cab and hit the engine.

Q. How did it hang next night, August 20th?

A. I didn't come by there next night.

Q. Well, the 21st?

A. The next time I come there was in the daytime.

Q. How did it hang then?

A. In the proper place.

Q. How much did it clear the eaves of the car then?

A. I didn't measure it.

Q. Do you remember about it?

A. I remember taking water there.

Q. Do you remember how high above the eaves of your cab it hung when you went back?

A. I didn't notice it.

Q. You can't say at all how it hung at that time?

A. All I can say it was hanging in its proper place.

Q. You can't give even approximately the number of feet that time, can you?

A. No.

Q. How is it you can give the number of feet at night on the night of the accident and couldn't do it when you took water there in the daytime.

A. Just as I say from passing there. No more the day I took water than the night I passed there.

Q. You remember particularly this night and don't remember

the day you took water there how it hung with reference to the number of feet it cleared the eaves of your cab?

A. No more that day than I did that night.

Re-examination:

Q. You did, however, just as much that day as you did that night?

189 A. Yes, as much as any other day.

Q. All along that line you think it hung two feet or more; that is the best you can give?

A. Yes, sir.

And further saith not.

LOUIS MOORE, being duly sworn, next deposed as follows:

Direct examination:

Q. You were the engineer upon the train that picked up Mr. McDade, were you not?

A. Yes, sir.

Q. I wish you would state what condition you found his body in. That is, where he was lying?

A. He was lying on his right side facing west.

Q. State whether or not you noticed any bruised about his person, and, if so, describe them to the jury.

A. The right side of his face was bruised, I think, as well as I remember—a kind of scratch on the side of his chin. That is about all the bruises I noticed about him.

Q. Did you state that there was any blood there?

A. Yes, sir, there was a puddle of blood where his head was laying.

Cross-examination:

Q. You say he was lying on his right side?

A. Yes, sir.

Q. With his face in a pool of blood?

A. The side of his head.

Q. What was the character of this pool of blood? How large was it?

A. I couldn't say. It was probably a third as large as that piece of paper there.

Q. What kind of a scar did he have on his chin?

A. A little scratch or something on his chin.

Q. Just a little scratch?

A. I didn't notice it much. There was blood on it.

Q. Did you notice it at all?

A. Yes, sir.

Q. Describe it.

A. As well as I remember, it was on his chin on the right side a little mark or something.

Q. Over on the right side a little cut that didn't amount to much?

190 A. I don't know what it amounted to.

Q. Well, Mr. Moore, didn't he have a cut through his chin here to the bone in the centre?

A. I don't remember seeing that.

Q. All you remember is the place on the right side?

A. Yes, sir.

Judge HAMMOND: Was he dead, Mr. Moore?

Ans. He was warm. I couldn't say whether he was dead or not.

Judge HAMMOND: You didn't examine the skull to see if it was broken?

Ans. No, sir.

Q. Did you take hold of his face?

A. Yes, sir.

Q. What was the condition of it?

A. His right side of his face was bruised pretty bad, and his eye looked like it was knocked out. It was all swollen up.

Q. What was the condition of the jaw-bone?

A. I couldn't say.

Q. You took hold of it?

A. I took hold of the back of his head.

Q. I thought you said you put it on his face?

A. I taken hold of the back of his head.

Q. Did you understand my question a moment ago as to whether you took hold of his face or not?

A. I don't think I told you I taken hold of his face any more than putting my hand on the back of his head straightening him.

Q. You say *a* that you noticed was this bruise on the right side—the side he was lying on—and this little place on the right side o his chin?

A. The bruise on his chin was on the right side and all the bruises I noticed were on the same side.

Judge HAMMOND: Did you notice any broken bones in his body—the arms or legs?

A. No, sir; we were only there a few minutes. We took a cot and placed him on it and straightened him out.

Q. Did he have any scars on his head?

A. Not that I remember.

Q. You didn't see any bruises on his left side at all?

A. No, sir; I did not.

Q. Did you look?

A. I looked at the man and picked him up.

Q. You made a casual observation and picked him up?

A. Picked him up and brought him to Forrest City.

191 Q. You are positive there was no cut through the chin to the bone down the center?

A. I couldn't be positive of that. I never saw it though.

Q. How could you be positive about the other?

A. He was laying on his right side.

Q. And the first thing you would see would be the left side?

A. Yes, sir; about the first thing.
Q. Then you turned him over and put your hand under his head, didn't you?
A. Yes, sir.
Q. And helped carry him?
A. We didn't carry him any distance. We lifted him up in the baggage car.
Q. Didn't you look at his face?
A. Yes, sir.
Q. You don't remember about a cut about the chin down to the bone?
A. There was blood and dirt on his chin. I didn't wash his face

Re-examination:

Q. Your object was to take him to Forrest City the nearest place for a physician?
A. Yes, sir; I got an order at Brinkley to look out for him and found him there and stopped the baggage car opposite him.
Q. You are positive that the right side of his face and eye was bruised?
A. Yes, sir; I am positive of that.
Q. At that time, did you notice any blood running out of his ear? Or did you notice that?
A. I don't remember whether there was any running out of his ear or not.
Q. You do know he was dirty and bloody?
A. Yes, sir.
Q. The ground there was dry, was it?
A. Yes, sir; very firm.
Q. Could you see where the blood on the ground came from?
A. It was right under his head, right where his head lay.
Mr. FITZHUGH: You didn't see blood anywhere else around there?
A. No, sir.
Mr. WRIGHT: Did you look for it?
A. I looked with a torch to see if he had been drug by
192 the car and I remarked to the conductor that he lay where he fell.
Q. And you saw no evidences down the track there?
A. No, sir; I looked with my torch.

And further saith not.

—— MALOY, being duly sworn, testified as follows:

Direct examination:

Q. What is your business?
A. I am a photographer.
Q. How much experience have you had in the art of photography?
A. I guess about twelve years.
Q. I will show you a photograph and ask you certain questions on it. This photograph is supposed to be a photograph of a tank

with this spout you see there. That was taken by a gentleman who put his camera in this track twenty-five yards from this object. His purpose was to take—to show the angle between this upright piece here and the incline of the spout toward this track. He stood twenty-five yards away from the *this* spout—down the track—some five or six feet from the track, and his camera was on the ground at about 3 feet elevation would that show the angle in there as greatly as if he were even with the object?

A. No, he should be on a perfect line. This is supposed to be perfectly square. It should be right out about here. He should be perfectly square and then he would show the perfect distance.

Cross-examination:

Q. What distance from the track do you suppose that was?

A. I couldn't tell.

Q. Wouldn't that have a great deal to do with it?

A. Of course the further away you are the truer it would be.

Q. If only four or five feet?

A. It would distort it worse than it is there.

Q. The nearer the spout is to the line in which the camera is in, the more perfect it is, isn't it?

A. What I understand you want to show is the distance here to there, isn't that the idea?

Mr. WRIGHT: That is the way I asked it.

193 A. That is what I understood. To show the correct distance in proportion from here to here as it would be from here to here.

Q. The nearer it is to the line in which the camera is placed, the more accurate it would be?

A. Yes, sir.

Q. Does a difference of a few feet make an appreciable distance in the picture?

A. That depends on where your camera is from this.

Q. How far would you take that for?

A. It depends altogether on the instrument.

Q. Suppose the instrument is of such a size to make it perfectly—a view of that kind—within a radius of four or five feet, wouldn't that show it all right?

A. No, that would be too close.

Q. If the object is four or five feet——

A. It would not make much difference; twenty-five yards is quite a distance to make a photograph.

Q. It isn't too far with the proper camera to get a correct picture?

A. You wouldn't notice—in a picture of that size—you wouldn't notice much difference.

Q. And, if a picture is taken at a distance of twenty-five yards, a variation to the right or left of four or five feet would not make much difference?

A. No, you wouldn't notice it on a photograph.

Q. And it would show the angles properly?

A. Yes, sir.

Re-examination:

Q. Would that be the proper place to take a photograph?

A. If you want to get perfectly true, you would get on a line.

Q. About the elevation, you would want to be even with the lower part of the spout?

A. If you want it perfectly correct.

Q. If you are on the ground and the spout 12 or 15 feet above, that would be taken into consideration?

A. Yes, but at a distance of twenty-five yards, it wouldn't make much difference.

JUROR: You use a lens at different angle?

A. Yes, sir.

JUROR: Say 25 yards away; what angle would you say that was made with?

A. I would say a long-focus lens. How high is that spout?

JUROR: Nineteen feet from the ground.

194 A. A lens about 90 degrees would make that spout about an inch shorter.

Mr. WATSON: In taking an upright post or anything of that sort, it wouldn't make any difference; you would get it upright?

A. If it is standing perfectly straight.

Mr. WATSON: Suppose you had something out there the same size. Suppose, for instance, this was perfectly round and that you would get off here to the south of it 25 yards, it would take the angle correctly, wouldn't it?

A. If you would keep it in a perfect line.

Mr. WATSON: Suppose it varied three or four feet from a straight line; it would still take this one perfectly straight?

A. Yes.

Mr. WATSON: If there were only a small rod, extending from it, there would not be any appreciable difference?

A. Not in a photograph.

Examination by General PETERS:

Q. Can you tell from looking at that picture, whether the spout is taken in a position of right angles to the track—across the track, or does it appear?

A. I can tell it is not made at right angles with this here, because, if it was, you would not see those two poles. If that was made at right angles, they would both be on a line and you would not see this.

Q. I mean as to the position of the spout. Assuming that spout is a movable one—that it might go up or down or change a little—can you tell from that photograph whether the neck of it is directly across the railroad track, or is it leaning a little to one side or the other?

A. I don't quite understand.

Q. Assuming this is the track; whether that pipe is hanging——

A. Across the track the way it is now?

Q. Yes, or does it seem to have been to one side or the other?

A. That would be pretty hard to tell. It don't look to me there that it is standing across the track the way it is there. I wouldn't think so.

Q. Assuming that this spout comes down and there is an opening to it. That opening doesn't appear pointing toward the railroad track—it rather appears pointing from you?

A. That would naturally come from photographing from the ground because you are looking up.

195 Q. Suppose the mouth of the pipe was turned toward the camera somewhat, would it or not look quite different?

A. It would turn the mouth around a little more, but as to the position of the pipe, it would not change it at all.

And further saith not.

J. P. POOLE, being duly sworn, next deposed as follows:

Direct examination:

Q. What is your business?

A. Foreman bridges and building of the Choctaw.

Q. I wish you would state whether or not, under your supervision, lies the construction of tanks, etc., on railroads?

A. Yes, sir; it is.

Q. How long have you worked for the Choctaw road, Mr. Poole?

A. Three years this past January.

Q. I wish you would state whether or not the stationary pipe of the tank at Goodwin has ever been changed since Mr. McDade was killed? The stationary pipe—the gooseneck?

A. It has not.

Q. Have you made any measurements from a line dropped perpendicularly from the base of the pipe to the outside of the rail; from the end of the stationary pipe?

A. Yes, sir.

Q. What was that?

A. Four feet 6½ inches to the center of the rail. We call it the supply-pipe. It is the pipe where the water comes from the tank and goes into the downspout to go into the engine.

Judge HAMMOND: Four feet 6½ inches, that is from the end nearest to the pipe?

Ans. Yes, sir.

Q. Did you make any measurements of the angle of the spout and all that before it was changed?

A. No, sir.

Q. But you know the supply-pipe has never been changed and you have made measurements recently as to that?

A. Yes, sir.

Q. In fact, you made that last night, did you not?

A. Yes, sir.

196 Q. I wish you would state on what road- you have worked, Mr. Poole, in your lifetime?

A. A good many years ago I worked for the Burlington, and I was with the Rock Island about nine years.

Q. The- what other road did you go to?

A. This road.

Q. And you have been with them about three years?

A. Just three.

Q. I wish you would state whether or not the spout and tank used there at Goodwin was such a tank as is ordinarily used upon roads throughout the country; that is, upon those you are familiar with?

A. Yes, sir; it is about the type; it is the same type exactly. I would consider it the same kind of tank. It looks the same at a casual glance. I never measured, but I have seen a good many tanks and they all look about the same.

—. ——.

A. Yes, sir.

Q. What was the length of the spout; did you measure that too? Has that been changed?

A. No, sir.

Q. What did you measure that?

A. It was eight foot, ten inches. That is the measurement.

Cross-examination:

Q. Mr. Poole, how did the spout rest upon the supply-pipe; did the spout rest upon the supply-pipe?

A. Well, it does ordinarily, but sometimes the chain holds it from going clean down when it is at rest.

Q. Well, it is the side of the spout nearest the track about on a line with the supply-pipe, or a little nearer to the track than the end of the supply-pipe?

A. It is a little nearer from the fact that it has to turn over the end.

Q. So that the supply-pipe doesn't project towards the track as far as the side of the spout—the water-spout?

Q. At the point where it rests. You have just said it has to go over, and, for that reason, it is a little nearer the track than the end of the supply-pipe when it is in rest?

A. I don't believe I understand your question fully.

Q. Didn't you understand me just now when I asked which was nearer the track?

A. I understand that. If you mean the main pipe that comes out.

Q. That is the supply-pipe, isn't it?

A. Yes, sir.

197 Q. Well, I am taking your own terminology. You drop a perpendicular line from the end of the supply-pipe to the ground and that distance from that line to the center of the rail is four feet 6½ inches?

A. Yes, sir.

Q. So that, that fixes the distance from the end of the supply-pipe to the rail?

A. Yes, sir.

Q. Now, as to whether or not the water-spout at the top of the supply-pipe extends nearer to the track?

A. About two inches.

Q. That is, when it is in the ordinary position not in use?

A. Yes, sir.

Q. When you are speaking about it being the ordinary tank used on other railroads, you are speaking of the general structure, are you not? You don't pretend to testify to the extent of the angles of the spouts, do you?

A. I think that my intention was to say it was the ordinary type and ordinary tanks as I have been used to seeing them over the track—similar to the way that one stood.

Q. The way it does, you say?

A. The way it did and does now, both.

Q. Why do you say that?

A. It is just a little or more or less out. That is all the difference. They vary; tanks vary frequently.

Mr. WRIGHT: On well-regulated roads throughout the country?

Ans. Yes, sir.

Q. What?

A. The distance the spout hangs out. You can find them like alike on the same road or within 3 or 4 inches.

Q. All are supposed to be constructed, however, that they will clear the car, and a person sitting on the side of the car, are they not?

A. Well, I suppose so. I have never had that question come up about clearing the sides. We have always been particular about having them high enough. The reason we have them hang over is to enable the fireman to take hold of the spout, and we aim to keep it far enough over so as to keep it safe. We have no particular measurements, but we judge of them by the eye.

Q. Well, what is considered safe?

A. Well, some people consider one thing and some another.

Q. I am asking you now. What is considered safe with reference to the distance that the spout shall hang from the car? How much clearance shall there be?

198 A. How much clearance over the car?

Q. Yes, sir.

A. Well, I couldn't say as to that. We judge such things from the way the spout hangs and take into consideration the length of the spout. If the spout be longer, you can have it to stand over a little further, and, if it be shorter, you couldn't have it extend quite so far.

Q. What did I understand your position to be with the Choctaw?

A. Foreman of bridges and buildings.

Q. You then have immediate supervision of the construction of all these tanks?

A. Not all of them.

Q. Did you of this one?
A. Not when it was constructed.
Q. Have you had since?
—. ——.
Q. You can't get nearer than that?
—. ——.
Q. Was the change made under your supervision?
A. Yes, sir.
Q. When was that change made?
A. It was somewhere from the 5th to the 20th of September. Probably a little later.
Q. The 5th to the 20th of September, 1900?
A. Yes, sir.
Q. You can't get any nearer than that?
A. I can't from memory. I can say, however, after the 5th, because the man who done the work didn't commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th. If I had my book I could go get that positively.
Q. You are the foreman of bridges and buildings?
A. I have charge of the men working on the bridges and buildings and do whatever I am told or instructed to do by the general superintendent.
Q. Take a spout 8 feet 10 inches long—how much clearance should there be, the supply-pipe being 12 feet high? What clearance ought there to be between the car and the spout?

Mr. WRIGHT: Is he asking his opinion as to what would be prudent? I don't think it would be competent for him to state what his individual opinion would be.

Judge HAMMOND: Why not? Isn't he an expert? I think he can prove by an expert mechanic what is the proper construction in that expert's opinion. He may prove before the jury the expert's opinion as to the proper construction for the safety of those on the train. He can prove what the expert says is the proper construction.

199 A. The car at the top? The eaves?
Q. Yes, sir, the eaves.
A. Well, there ought to be perhaps 16 or 18 inches.
Q. That is your idea of the standard water-spouts and tanks, is it?
A. You didn't ask me that question.
Q. You say there ought to be only a clearance of 15 or 18 inches?
A. I said there ought to be that much.
Q. Then, if it clears the eaves of the car when suspended over it, in its nominal position, when not in use, 15 or 18 inches, state whether or not in that position a man sitting on the eaves of the car would be struck in an upright position.
A. Before I could answer that I would have to know the height of the car which will demonstrate the angle of the pipe. If the pipe be at a greater angle it would be less dangerous. If the car was

high, it would necessarily be at a greater angle to clear 15 or 18 inches.

Q. How high should the pipe you speak of hang immediately over the eaves? That is drop a line perpendicularly or draw a line from the end of the eaves of the car straight up to where it would strike the pipe?

A. I would consider it standard, if it cleared all cars four feet.

Q. And, unless it did, it would not conform to what you would consider a standard pipe and tank. That is your idea of how it should be constructed?

A. Four feet on a perpendicular line above the eaves of the car to the pipe.

Q. Why do you say it would be four feet?

A. That would clear any one standing on the car or anything of that kind. If it was a high car, it would necessarily have to be higher of course. That is, the pipe would be back and we were speaking of that kind of car and I said 15 or 18 inches, I believe.

Q. What would the size of the car have to do with this particular clearance? I asked you what the clearance should be in any event. That is, how high the water-spout should hang immediately above the eaves of the car?

A. Yes, sir, that is what I understood, and that is what I answered.

Q. What?

A. About four feet.

Q. In other words, if it hung properly, it would be four feet—the nearest point immediately above the eaves of the car—the nearest point to the spout on a perpendicular line from the eaves of the car should be four feet, although the clearance would be only 15 or 18 inches?

200 A. It would be that or perhaps more. If it hung at a clearance of 15 or 18 inches, it would probably be higher than four feet.

Q. Mr. Poole, how much of this spout would hang over beyond—extend over beyond the eaves of the car, provided the car was 13 feet or 13 feet one or two inches high and 10 feet wide?

A. Well, I couldn't answer that without reckoning it.

Q. Didn't you ever make any measurements like that?

A. Well, I made a sketch similar to that, but I don't remember the measurements. I don't remember the figures.

Q. Well, where is the band to which the chain under the spout is attached when hanging in its usual position on the pipe?

A. They vary.

Q. Well, on this pipe?

A. It is about four feet and eleven inches from the lower end or larger end of the sway-pipe.

Q. What is the extent to which a furniture goes beyond the rail? How far over the rail does a furniture car extend?

A. Well, a furniture car that would be ten feet wide would extend over the rail the difference. The gauge of the track is four foot eight and a half inches. Half of that would be two feet 4¼ inches, and, if you subtract that from five feet, you have the distance outside

the rail. An ordinary rail is 2¼ or 2½ on top, so you could take off that, if you want to come to the center. I can tell in a minute what it would be. Five feet would be half of a ten-foot car. It would stand out, according to that two foot 4½ inches.

Q. Wouldn't it be more than that?

A. You can figure it, make the deduction yourself. It is five feet to the center of the car and two feet 4½ inches would leave——

Q. What is it?

A. Two feet 6¼ inches. That is half of the rail. If I have figured correctly, it would be two feet 6¼ inches, from the center of the rail to the outside of the car.

Q. Two feet 6¼ inches?

A. That is what I figure it.

Q. Mr. Poole, you spoke about a clearance of 15 or 18 inches. What kind of a car would you take for that?

A. It would clear any car. That is my opinion. Anything that was ordinary.

Q. That is, clear the eaves of the car 15 or 18 inches?

A. I think so.

201 Q. And you never measured to find out how much of the spout hung over a car 10 feet wide and 13 feet tall, did you?

A. This particular pipe?

Q. This particular pipe.

A. At the present time?

Q. Did you make any measurements before?

A. No, sir.

Q. Have you made any since?

A I made them last night.

Q. On that score?

Mr. Wright objected to these last several questions.

Judge HAMMOND: "If this gentleman reconstructed this tank, he knows how it was before. He can tell the directions he gave to be made."

Q. Do you know the changes that have been made from your own observation since?

A. Only what the man told me, that is all.

Mr. FITZHUGH: "As to bringing this matter of change up to show negligence, I think the court's ruling is correct, but I do make this distinction. Here we are seeking to get at some measurements now, and, if this man knows exactly what the changes were, and by taking the measurements as he did last night and knowing what the change was, if he does know it, we can arrive at its position before the injury occurred, and I think for that purpose only—for the purpose of getting at the condition of affairs that existed at the time of the accident the evidence would be competent with a limitation such as your honor has suggested and which is unquestionably correct."

Mr. WRIGHT: "I can suggest a way that can be gotten at. Mr. Fitzhugh has introduced a witness who has said it was four feet, three inches from the pipe to the middle of the rail. We have in-

troduced two witnesses who say it was four feet 6½ inches. That is one measurement. Then Mr. Fitzhugh has introduced witnesses who said the pipe was 19 feet tall and we have introduced a witness that says it was 19 feet 6 inches. We have 12 feet for the supply-pipe and the length of the spout, and it looks like this witness could tell the clearance from those measurements."

Judge HAMMOND: "I can't determine the relevancy of the testimony by some other witness. The fact that Mr. Fitzhugh can get what he wants to get out of this witness does not affect his right to get it from this witness. The question is whether or not these questions are asked for the legitimate purpose of showing what these measurements were, whether they are asked for the sinister
202 purpose of introducing the fact that the change had been made. If he made the change and directed the changes and can tell what changes directed, then the jury can figure out what they were for. If he directed the changes and gave specific drawings or specifications for the changes to be made, and we can get that fact out, the jury can figure themselves and do not need anybody to do it for them. What we all want is to know these measurements at the 19th of August. I shall rule, if this superintendent of bridges and construction on this road, whose business it is to attend to this business of the company, at the time these changes were made in September, if he gave the specific directions, I will allow him to state what those directions were. He knows what it is; if he gave any specific directions for those changes, he can state it. Ask him if he gave the man who made these repairs, whether he gave him any specific instructions and what they were."

To the ruling of the court defendant duly excepted.

Q. Mr. Poole, did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

A. I gave a letter, I wrote a letter to all the foreman.

Judge HAMMOND: Did you give this man who made these changes between the 5th and 20th of September—did you give him any specific specifications?

A. I wrote a letter and directed it to all the foremen and told them in case tanks were hanging over the track too far to look after them, and if they were too far, to put them back.

Mr. WRIGHT: "I object to that and ask that it be excluded."

Same was excluded by Judge Hammond.

Judge HAMMOND: "Did you give him any specifications to work by?"

A. Just a letter. That is all. Nothing else. Only what I stated.

Q. Do you know of your own personal knowledge that these changes, if any, were made?

A. Just what the men reported to me.

Q. Weren't you there last night?

A. Yes, sir.

Q. Do you know whether they were made or not?

A. I know there is a mark there. It looks to me like it had been raised. The man told me he had raised it.

To this last answer Mr. Wright objected.

Judge HAMMOND: "If this company has changed this structure in such a way that we cannot get at the measures that ex-
203 isted on the 18th of August, except by comparison, I will let that change go in. You may show the measurements as they existed August 18th."

Mr. WRIGHT: "I submit that both sides have shown clearly and that is the reason I object to Mr. Fitzhugh's questions. We have proven by Mr. Sayers, who measured it, as he says, before any change was made, and we fixed by Mr. Pool that the change wasn't made earlier than the 5th of September. We have proven by Mr. Sayers that the top measurement was 6 inches—*i. e.*, dropping a perpendicular line from the top of the pipe. Mr. Walker makes that same measurement four and a half."

Judge HAMMOND: "There is a controversy here between this plaintiff and defendant. He has one measurement and you have another, and I cannot determine the competency or relevancy of proof by the fact that there is other proof in the case. You have a difference here and it may be important. I don't know whether it is or not. I am trying, with all effort I can, to get at the exact figures in this case and it may be a matter of inches. Now, there is a difference here between the witnesses for plaintiff and defendant as to the measurements of this structure as it existed on the 18th of August. Unfortunately or fortunately it already appears in evidence that the changes is not now in the same condition as it was then, because the changes have been made in it. We cannot send a man out there now and measure these distances as they existed on the 18th of August, because a change has been made. If it is possible, through the knowledge of any one of these witnesses or any parties familiar with them—if it is possible at all to reach that conclusion and solve that question by a comparison of measurements of that which existed today and that which existed at that time, or to show from the measurements we now have what they were on the 18th of August, I shall allow counsel on either side to do that, and to that extent I have let it in. The fact that a change has been made is already before the jury, and the court has told this jury time and time again that they understand it and are perfectly capable of applying the principle—that the mere fact that the company has made a change in this structure for the purpose of preventing the same character of injuries already developed is not to be taken against the company. The supreme court has said that, and they understand it. If a man has a vicious horse and knows it, the fact that he finds it out and sell- it, does not allow them to apply the fact that he sold that horse against him. When we come to talk about these structures and measures, it is perfectly plain in my
204 mind, and has been all along, that if we cannot get at these measurements, except by taking notice of these changes, we will have to do it."

Q. Did you make any other measurements there last night other than the one given?

Mr. Wright objected, the court overruling the objection, and defendant duly excepted to the ruling of the court.

A. Yes, sir.
Q. What were those measurements?
A. I measured the distance I thought the spout stood from the track from the spout when it was up and down to the ground or to the top of the rail.
Q. How did you do that?
A. Dropped a line from the end of the spout.
Q. What was that distance?
A. If my memory serves me right, it is 19 feet 3½ inches.
Q. Now, Mr. Poole, how much has that water-spout been elevated under your instructions?
A. I don't know, sir.
Q. Didn't you get up and look and say a few moments ago that the bar had been elevated?
A. Yes, sir. To the best of my judgment three inches.

Mr. Wright continued to object and excepted to the court's action in overruling his objections.

Q. The cross-bar—that is, the one upon which the pulleys hang and over which the chains run and connect with the pipe?
A. Yes, sir.
Q. And, at the end of these chains, are the weights?
A. Yes, sir.
Q. To the best of your knowledge, that cross-bar has been elevated three inches under the instructions given by you in September? It had been raised three inches?
A. I judge so.
Q. What effect would the raising of that cross-bar—lifting that three inches—have upon the chain and spout?

Mr. Wright again objected—same ruling—same exception.

Q. How much, in other words, would that shorten the chains?
A. Well, it would be guesswork.
Q. You don't know?
A. No, sir.
Q. Isn't it a fact that that would shorten the chains twice the amount of the elevation of the bar?
A. Yes, sir, it would seem so.
Q. Why would you say that if you don't know?
205 A. Ordinary intelligence would teach me that. I said it was impossible to say exactly. You wanted to know how much, and, as I understood you, wanted it in inches. It would be about six or seven inches—5 to 7 inches.
Q. What?
A. It would raise the spout.
Q. Instead of raising the spout that, wouldn't it shorten those two

chains six or seven inches—shorten the chains—and don't that elevate the spout so far as the incline is concerned twelve or fourteen inches?

A. I don't think so. Where do you mean to hitch that chain? Where is it hitched?

Q. Here is the cross-bar and here is two weights on this side—chains attached to the two weights running through the pulleys and connecting with the pipe near the center four feet and eleven inches from the lower end. Now, the way the spout hangs—that is, so far as its slant is concerned and the clearance there will be between it and the car, depends on the length of those chains, doesn't it?

A. Yes, sir.

Q. If you shorten the chains, you will pull the spout back further towards the upright bars there and away from the track, don't you?

A. Yes, sir.

Q. Now, isn't it a fact that the same result is produced by elevating this cross-bar?

A. To a certain extent, yes, sir.

Q. Isn't it a further fact that the elevation of the cross-bar shortens each of those chains—if it is elevated three or three and a half inches, doesn't it shorten each of those chains six or seven inches?

A. No, sir.

Q. What did you say just now?

A. I said it would have a tendency to raise the point of the spout about that distance.

Q. Then it would carry the point of the spout—the nozzle—back about six or seven inches?

A. Yes, sir, that is my idea.

Q. Or make it that much higher—which?

A. Carry it back. It wouldn't raise it certainly.

Q. You say it wouldn't raise it, if you have the chains shortened. When you elevate those bars, do you mean to say that would not elevate the upper end of that spout at all?

A. That is what I did say. It would take it back.

Q. Wouldn't it make it higher from the ground?

A. Yes, I understood you to say lift the spout up. It
206 would lift it back, and the radius being the same from here, it would take it this much up of course.

Q. How much higher would the top of the spout be on account of the elevation of that bar—say three inches?

A. I haven't figured it out, and I couldn't answer it.

Q. But since it was elevated—this bar was elevated you say three inches—the distance from the top of the spout—that is from the highest point of the spout to the ground was, as you say, 19 feet three inches.

A. It is now, yes, sir.

Judge HAMMOND: "According to your measurement it was 19

feet six inches before. How can we get such a thing as that? It is really lower, according to his estimate, now than it was before."

Mr. FITZHUGH: "Our measurement was to the ground and he measured to the top of the rail."

Judge HAMMOND: "Really according to your own testimony, your man Walker, he makes it 19 feet. Your man Sayers makes it 19 feet 6 inches, and this man makes it 19 feet 6 inches."

Counsel for defendant here suggested that counsel and jury go out and view the tank, to which counsel for plaintiff agreed. Judge Hammond left said matter to the jury to decide, and, some of the jury being opposed to same, said trip was not made.

Judge HAMMOND:

Q. Drop a line from the top of that spout to the ground. As a matter of safety to people operating the railroad trains, how far ought that to be from the rails?

A. In my opinion it ought to be 15 inches to two feet.

Q. Take that plumb line and drop it from the top of the spout to the ground. How far ought that to be from the track—the nearest rail—to be safe for the people operating the trains?

A. Judge, I will tell you, to be honest about that, you can't tell to make them safe. It depends largely on the height of that spout. I would consider, ordinarily, 6 or 8 inches all right. Fifteen I would prefer it, but I have worked for large corporations in the West whose rule it was that the plumb line dropped from the end of the spout to the track would strike the rail nearest the tank.

Mr. FITZHUGH:

Q. How high was that tank?

A. On that road we used Fairbanks' standard tanks and fixtures.

Q. How long ago was that?

207 A. I quit working for them three years ago.

Q. They have been making cars larger all the time, haven't they?

A. Yes, sir.

Q. It depends, too, on the distance of the line dropped perpendicularly from the base of the water-spout—in other words, the difference from the structure to the rail?

A. Yes, sir.

Q. They vary as to that, don't they?

A. Yes, sir, very little, however.

Q. On some roads don't they have them 6 to 7 feet away—the base of the spout?

A. I don't know of any that have them six or seven feet.

Q. Didn't you state that the supply-pipe—drop a line from the end of the supply-pipe perpendicularly to the ground and measure from that plumb line to the rail would be four feet and what?

A. Four feet 6½ inches.

Q. Now, you did state that the base of the water-spout hung about 2 inches nearer to the rail than the end of the supply-pipe, did you not?

A. Yes, sir.
Q. What is the diameter of the water-spout at the base?
A. About fourteen inches.
Q. Now, Mr. Poole, isn't it a fact that this bar was elevated more than three inches? Did you measure it or judge by your eye?
A. I told you I measured it.
Q. You measured it, and it was how much?
A. Three inches.
Q. Did you get up and measure on the platform?
A. I certainly did, or I wouldn't tell you so.
Q. You didn't tell me how?
A. With a rule.
Q. You say it was three inches?
A. Yes, sir, I took my rule and my hand this way and put it up and held my thumb on the place to get it and looked at it. There may be an eighth of an inch variation, but it is not over that.
Q. What effect does that have upon the chain, so far as shortening it is concerned? The chain which is attached to the weights and passes through the pulleys and pulls the pipe back? State what effect it has on those chains.
A. Six or seven inches—five to seven.
Q. It does what?
208 A. Pulls it back towards the galley frames.
Q. I am asking what effect it has on the chains. I am not speaking of the spout. If you were going to produce an effect the same as shortening those chains 6 or 7 inches, how much would you elevate that cross-bar?
A. If we shorten the chains 6 inches?
Q. Yes.
A. Well, it would not pull it back six inches at the point where the chains ar- hitched.
Q. The shortening of the chains six inches wouldn't?
A. No, sir, not in my judgment.
Q. Did you ever make a test of that kind?
A. I have made a test on other things.
Q. Tell the jury how it is hitched.
A. The pipe stands here and the chain is hitched here and comes way up here, so that the chains are about the same angle as the pipe, and you shorten this 6 inches, it would not pull this back 6 inches. It might have a tendency to raise it up some from the bottom, but you take and bend a line there and shorten it 6 inches here, and you don't pull it back absolutely 6 inches.
Q. Here are the chains running over this pulley, attached to the weights resting on the floor?
A. Yes, sir.
Q. Say you elevate this bar to which the pulleys are attached 3 inches, how much do you say that will pull back?
A. I told you already 6 or 7 inches, possibly a little more, not at the point where the chains are hitched. It would raise it back at the top, but it wouldn't act the same as shortening the chain. It

would act the same as shortening it relatively that much, but not so much as six inches. That is my opinion.

Judge HAMMOND:

Q. If you were constructing one of those tanks, with your skill and knowledge, and wanted to make it safe, what measurements would you make?

A. I would put away from the track.

Q. Put what away from the track?

A. The tank according to the center of the track, and I forget the standard measurements. Each road, as a rule, have a standard measurement to set the center of the tank from the center of the track.

Mr. WRIGHT: Some roads have it different from the others?

A. Yes, sir; I couldn't give the exact distance of tanks here. I never constructed but one tank on this line.

209 Judge HAMMOND:

Q. Do you know what ordinary railroads use for tanks to be set back from the center of the track to the tank?

A. Yes, they vary from 7 foot 10 to 8 foot and a half. I don't know that I ever saw one nine foot.

Q. What is the measurements for these structures that lean toward the track from the tank?

A. On the ordinary it is four to six inches projection—that is on that kind of tank. There is another kind of tank where it is necessary to put it out further because of the construction of the pipe.

Mr. FITZHUGH:

Q. If the distance from the end of the supply pipe to the rail is 4 & a half foot, how much does the water spout beyond the rail when it is let out?

A. I don't know.

Q. Can't you tell? It is merely a matter of subtraction. You say that the distance from the end of the supply pipe—that is where the spout bears against it when it is in use, is four feet, six inches?

A. Yes, sir.

Q. If that is four feet six inches, to the rail, what distance beyond the rail nearest to the tank does the water-spout extend when in use?

A. The down-spout—the one taking water? They are both water-spouts.

Q. Call it the sway spout.

A. Well, it would depend on the length of the sway spout.

Q. We are talking about that pipe there. How much beyond the rail will it extend?

A. You could figure it for yourself. It is four feet 6½ inches from the end of the pipe to the rail, and the pipe is 8 foot 10, I believe.

Q. How far, when in use, will it extend beyond the first rail the sway pipe?

A. When down taking water in the ordinary position?
Q. Yes, sir.
A. Four foot 6½ inches, I said, was the measurement. It would be two and a half inches.
Q. You say it would extend beyond the first rail five feet?
A. No, two feet.
Q. Aren't you mistaken about that?
A. I expect you had better figure that yourself.
Q. Please make the calculation. You have your paper and
210 you are the constructor. You say the distance from the end of the supply pipe against which the sway pipe bears when in use is 4 feet 6½ inches?
—. ——.
Q. How far will that make the sway pipe, when in use, extend beyond the first rail?
A. It would be the difference between four feet 6½ inches and the outside measurements of the pipe, which is eight foot 10 inches.
Q. So that, it would extend beyond the nearest rail to the tank 4 feet 3½ inches?
A. No, because the pipe when down, stands back against the galleys frames eleven inches.
Q. Well, take off the 11 inches, how much would it be?
A. That would be about right.
Q. Where is the opening into the water tank?
A. You mean that goes into the supply pipe?
Q. Where the sway pipe conducts the water into the boiler—where it is located with reference to the tender?
A. An engine tank—about the center.
Q. How far does the eaves of a furniture car extend beyond its sides?
A. The eaves beyond its sides? About 4 inches, I should judge. That is, taking from other measurements—from hearsay—and looking at them. I never measured one in my life. It may be less or a little more. I have never measured one.
Q. You don't know of your own knowledge?
A. No, sir.
Q. And you are simply giving an estimate?
A. Yes, sir.
Q. Did you, as a representative of the company, have reason to believe that these pipes, or some of them, or this one there, wasn't in proper position?

To this question Mr. Wright objected, the court sustaining said objection. To the ruling of the court plaintiff duly excepted.

Q. Did you make any measurements in regard to these clearances you spoke of?
A. No, sir.
Q. You are giving your estimate of how it should be?
A. My opinion, yes, sir.
Q. Do you know the angle at which this pipe hung?
A. The degree of the angle, you mean—no, sir.

Judge HAMMOND: What part of this pipe is nearest to the rail?

A. It is twelve feet to the bottom, the bottom would be the nearest.

Judge HAMMOND: You think the bottom of the sway pipe is nearest to the rail than any part of it?

211 A. Yes, sir; I don't know that I ever measured it accurately, but I am quite positive that is the case.

Mr. FITZHUGH: You think it is nearest to the rail?

A. Yes.

Judge HAMMOND: What is nearest to the rail?

A. The judge wanted to know. Suppose that is the rail and this is the pipe out here. He wanted to know what part of the pipe was nearer to the rail when it was standing in that position. The bottom part.

Judge HAMMOND: Of course, that is nearest, measuring perpendicularly.

A. That is what I thought you asked.

Q. If you drop a plumb-line from the top to the bottom of it to be safe for people on the train how far should it be from the rail?

A. The Rock Island used to consider that, if the point of this was perpendicular about the rail, it was. I have heard some say yet that it is. I think it ought to stand outside.

Q. How much?

A. Any distance outside.

Q. What in your opinion, as an expert builder, is the least distance from the rail?

A. I would consider from 5 to 12 inches. I don't consider it absolutely dangerous, if it hangs right over the rail. That is, you must take into consideration the length of the pipe and the height of the pipe from here. If this pipe would be 12 feet above here or 16 feet above, if it was hanging over the middle of the track, it would be absolutely safe.

Q. A nine-foot pipe. You can't have your pipe any longer than it is necessary to be for the tender.

A. Make the supposition on a nine-foot pipe and 12 feet to the bottom from the top—with the ordinary construction of pipe—if it hangs any outside of the rail, I would consider it ordinarily safe.

Mr. FITZHUGH:

Q. Didn't you state while ago you would prefer it to hang 12 inches?

A. Yes, I would prefer it.

Q. Why?

A. It would be almost impossible for any one to get hurt with it.

Q. If it were 12 inches it would almost be impossible?

A. I think it would be impossible.

Q. You stated at first, as I understand your answer to his
212 honor's question, that anywhere from 5 to 12 inches, and, when he asked you if five was the limit, didn't you answer yes?

A. No, I don't think I did. My intention was to answer the judge just as I think about it.

Q. I am asking what you did answer. Didn't he ask you if five was the least for safety and didn't you say yes.

A. I don't think I did in that many words.

Judge HAMMOND: "He didn't say that. He said, Even if it hung right over the rail, it might be safe?"

Q. And that you preferred 12 inches?

A. Yes, sir.

Q. Do you know what part of this pipe will fall nearest to the furniture car passing under it—the eaves of a furniture car 12 feet high?

A. It would be up near the center of the spout. It might be three feet. It would vary. It would be towards the center. I never measured it. As to the length of the pipe—it would be somewhere to the center.

Q. Do you know — much that pipe, when standing in its usual position, would clear the eaves of a cab of an engine?

A. No.

Q. Did you ever notice it at all?

A. I have noticed that it cleared well, but couldn't give you the inches.

Q. About how much?

A. I judge it cleared a foot. Yes, I judge it did.

Q. You are certain it would clear the eaves of a cab a foot—that is, would it clear it that much?

A. No, I am not. I never measured it and never took particular notice of it.

Q. That is your best judgment, that it would clear the eaves of the cab one foot?

A. Somewhere in there. There is a difference in the height of cabs.

Q. What is the usual height of cabs?

A. I don't know. I never had any occasion to measure them.

Mr. WRIGHT: That is not in your department, is it?

A. No, I have nothing to do with that whatever.

Q. If it cleared the eaves of a cab one foot, a car of the same height it would clear the car also one foot?

A. Objects of the same heights and width there would be the same clearance, of course.

—. How much wider, if any, is the cab? Do you know the width of a cab?

A. No.

Q. This center part you say about the center of this spout
213 is the thing which comes nearest to the eaves of the cab?

A. I don't know.

Q. A cab or a car of the same height?

A. Of the same height, yes, sir.

Q. You think, to the best of your judgment, that about the center

of this spout would clear the eaves of a cab or car the same height about one foot?

A. I don't understand that question.

Q. The spout you say will clear a cab or a car about one foot?

A. I said the car would. I don't know what a cab would clear.

Q. I understood you to say that the center of the spout is the thing which is nearest to the eaves?

A. Looks to be that way. You said a 13-foot car—that was my understanding, and I took it that the spout would be about 12 feet high and the car about 2 feet and a half higher.

Q. A thirteen-foot car would not be that much higher, would it?

A. 13 foot 5 inches would be about 2 feet, yes, sir.

Q. What would?

A. A 13-foot car would be 2 feet higher than 11 foot 8 inches.

Q. What is 11 foot 8 inches?

A. That is the center—12 feet—take off 4 inches for the spout. You base on twelve feet to the top of the supply pipe.

Q. What is the diameter of the pipe?

A. The outside diameter varies from 7 to 9 inches.

Q. I am talking about this one?

A. The diameter—the hole in the pipe is six inches—I couldn't give the exact outside diameter? That is at the back but there is a ball on it that is eleven inches.

Q. You measured the distance where the band is around the water-spout to which the chain is attached from the base of the spout?

A. From the large end of the spout.

Q. To the base of the pipe?

A. This little chain underneath the spout is attached to this band and there is also a chain on the upper side of it?

A. Yes, sir.

And further saith not.

Defendant here rested.

214 *Rebuttal.*

Mrs. McDADE, being recalled on rebuttal, testified as follows:

Direct examination:

Q. I wish you would state what amount or portion of the income, or salary rather, of Mr. McDade consumed in the support of yourself and three children?

A. Why he spent all he made for the house and family expenses.

Q. State what the necessary expenses of yourself and children were?

A. You mean house rent? We always lived in a rented house. We paid at the time of his death $15.00.

Q. What were the living expenses, grocery bills, for yourself and three children?

A. That was always $28. Or $30.00; sometimes a little more.

Q. Did you have any servant?
A. Yes, I always kept a servant when he was living. I haven't had one since. Don't guess I ever will any more.
Q. How much was that?
A. I usually paid a girl $1.50 or $2.00 a week.
Q. About six or seven dollars a month?
A. Yes.
Q. And the clothing of yourself and three children—about how much was that a month?
A. Well, say $20.00 a month. It takes a good deal to dress three children—shoes and everything.
Q. You said, I believe, that your husband didn't drink or spend any money like that?
A. No, he didn't throw his money away.

Cross-examination:

Q. I believe you said he was making $60.00 or $70.00 a month?
A. He made more than that. He made about $70 or $75.00 a month and we spent every cent of it.
Q. I suppose his own expenses, his clothing——
A. He didn't buy much clothing. He usually bought a suit in the fall and a suit in the spring.
Q. He did buy his own clothing, and board, etc., would, I suppose be about a third of the whole expense?
215 A. His clothes and all didn't amount to more than $50.00 a year.
Q. I mean what he spent upon himself and he was out on the road and had to get his meals out there?
A. No, I always fixed him a lunch.
Q. Didn't he have to have any meals at all?
A. He very seldom took any meals on the road.
Q. At times he did take them?
A. Not often.
Q. Of course, he lived at home and got his food there?
A. Yes.
Q. That was part of your grocery bill—what he ate and all of that? There were four of you, two grown people and three children—one was very young, was she not?
A. Yes.
Q. His portion would be, dividing them up, a third or a fourth of what the family consumed?
A. Yes, sir.

And further saith not.

Counsel for plaintiff and defendant agreed that the height of the furniture car to the eaves is between 13 and 14 feet.
This was all the evidence.
Mr. WRIGHT: "If the evidence is closed, I have sent down a gentleman to have a photograph taken of this K. C. tank, and would like to use it in argument, and will let the other side use it too."

Mr. FITZHUGH: "I would be willing to accommodate Mr. Wright, but I might possibly want to ask that gentleman some questions."

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United
216 States court-house in the city of Memphis, in said district, on to wit, the 5 day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA & GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit by their respective attorneys and came again also the jury heretofore empaneled and sworn herein, when the trial thereof was again resumed, and there not being sufficient time to complete the same today, the further consideration thereof is hereby postponed until tomorrow morning.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura McDade, *et al.*, *vs.* Choctaw, Oklahoma & Gulf Railroad Co. Order of court. Entered and filed 5 day of Feb'y A. D. 1901. John B. Clough, clerk.

The judge charged the jury as follows:

United States Circuit Court, Western District of Tennessee.

LOUISE MCDADE ET AL.
vs.
CHOCTAW, OKLAHOMA & GULF R. R. Co. } Charge.

GENTLEMEN OF THE JURY: If you find from the evidence in this case that the brakeman, John I. McDade, was killed in any other way, no matter how, than by coming in collision with the water-spout overhanging the train on which he was at work, the plaintiff cannot recover. If he was not struck by the water-spout or by the chain depending from it in such a way as to cause his fall from the cars, your verdict should be for the defendant company. But if you find from the evidence that his death was caused by collision with the overhanging water-spout, either by a blow sufficient of itself to kill him, or by being so dazed or disconcerted by a blow from
217 the spout or the downhanging chain that he was either precipitated from or fell from the cars with sufficient force to kill

him, the company would then be liable to his widow and their children for such damages as are given by the statute of Arkansas, which has been read in your hearing. Unless you further find from the evidence in the case that McDade either knew of the danger of collision with the water-spout or chain or by the observance of ordinary care while working for the road or by such care on this particular occasion might have known of the danger, in that event his widow and children could not recover, for it would be his own fault not to protect himself against the danger.

I shall not delay your consideration of this case by reviewing any arguments of fact or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here has taken its respensibility, as once before in another case, to decide that it is negligence of itself for a railroad to so construct such appliances as that we have before us that they will injure the brakeman at work upon its trains. It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe for the brakemen on the trains is a conviction of negligence.

Therefore, I submit the case to you upon the plain propositions above mentioned. I repeat:

1. Was McDade killed by the collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

2. Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger either before or at the time of the accident.

If you find both these propositions in favor of the plaintiffs, they should recover. If you find either of them in favor of the defendant company, it should have your verdict.

The burden of proof on the first of these propositions is with the plaintiff; but on the second it is with the defendant. That means that if when you take this case of circumstantial evidence as to the killing of McDade, if you find that the proof by its weight
218 in favor of the plaintiff does not convince you that he was killed through any agency of the spout or chain, you should find for the defendant. It is not necessary as in a criminal case charging manslaughter or murder that the agency of the spout or chain in the killing of McDade should be proved beyond a reasonable doubt. But it is necessary that it should be proven to your satisfaction by a preponderance of the proof. If after weighing the whole testimony you find that it is equally probable that he was killed by falling from the train without any agency of the spout and chain in his taking off, the plaintiff cannot recover. That is to say, if the proof is so equally balanced that you cannot determine whether McDade was killed through any contributory agency of

the spout or chain, the plaintiff cannot recover. But if there is no such even balancing of the circumstances as shown by the proof and you are satisfied by the weight of all the testimony that he was killed through the agency of the spout or chain then the negligence of the company is established by that preponderance.

But if the defendant company has convinced you by a like preponderance or weight of all the proof that McDade either knew of the danger by its illumination from the headlight or by his previous knowledge of the conditions of the road in respect of this water tank and its overhanging spout, or if he might have known of it by the exercise of that due care which an ordinarily prudent brakeman should use to inform himself of the obvious dangers of his particular employment on that road—then the plaintiff cannot recover. Because the injury would then come of his own fault and not of the negligence of the company, however gross that may have been.

Here, again, if you find the proof so evenly balanced that you cannot determine whether McDade was himself negligent, as above described, you cannot charge him with it by your condemnation, because the burden is on the defendant company to show his contributory negligence by a preponderance of the proof.

I shall not comment on the proof because it is not necessary. But as a precautionary warning it is best to repeat what was said by the court so often during the progress of the trial, that you must not imply anything against the defendant company by reason of the fact that after this accident they made a reconstruction of these water-tank appliances. The court kept that fact out of the proof as long as possible. But in trying to decide the conflict of testimony about the measurements by feet and inches it became necessary to take notice of this change in order to understand the value of the proof as to measurements. The fact of the change has no other bearing on the issue of this case than that; and for the reason so often explained to you you should give the fact no other force than that which is necessary for the explanation of the distances.

219

Damages.

If you find for the plaintiff on the issues above submitted to you, what should be the measure of damages to be given to your verdict? Remember that this accident occurred in Arkansas and the damages are to be regulated by the statutes of that State and not our own.

This is the Arkansas statute:

SEC. 5911. "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the

person injured and although the death shall have been caused under such circumstances as to amount in law to a felony."

SEC. 5912. "Every such action shall be brought by and in the name of the personal representatives of such deceased person, and, if there be no personal representatives, then the same may be brought by the heirs-at-law of such deceased person; and the amount recovered in every such accident shall be for the exclusive benefit of the widow and the next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person. Provided, every such accident shall be commenced within two years after the death of said person."

This statute has been construed by the supreme court of Arkansas from which I quote:

5. Damages for wrongful killing.

"This was not a suit to recover for the benefit of the estate, but for the benefit of the widow and next of kin. The measure of their damages is what the jury may 'deem a fair and just com-
220 pensation with reference to the pecuniary injuries resulting from the death' of the husband and father. How is this compensation to be determined? By taking into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time; deceased's earning power, rate of wages, and the care and attention which one of his disposition and character may be expected to give to his family—all these are proper elements for the consideration of the jury in determining the value of the life taken. From the amount thus ascertained, the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict."

"The rule includes 'character, business qualifications and capacity for earning money.' It would be travesty upon justice and a reproach to the law if the sobriety, industry, honesty and ability of the deceased—the constituents of character, and the very things which determine a man's business qualifications—were not permitted to be considered by the jury. Otherwise our constitution and statutes, making railway companies responsible for all damages to persons, and giving to the widow and next of kin the right to fair and just compensation would be but a mockery. If these elements were excluded from the computation of damages, nothing would be left to consider that makes life of any value from a pecuniary standpoint."

The same case in construing the Arkansas statute as to the measure of damages of the children of the deceased uses this language:

6. Child's loss from parent's death.

"It would be an anomaly in human nature, and contrary to all

experience and observation, wherever social order prevails, and the family tie is recognized, to find a father of such character who was not of some pecuniary value to his children in the way of training and instruction. How much, is always for the jury to say, and each case will depend upon its own facts and circumstances. The attributes of such a character being shown in the father, the law would presume them of some value to his children until the contrary was made to appear. Circumstances or fortune might call him away from them all or most of the time, but it must be presumed in the absence of proof to the contrary, that the natural affection of a father, possessed of the characteristics shown here, would prompt him to counsel, train and care for his children in a manner to make his life of some pecuniary value to them."

221 These readings from the Arkansas statutes and the decision inform you in a general way as to the measure of damages. I beg to say in addition that reasonable men would not wish by their verdict to loot the railroad company because a man has been negligently killed. Either through sympathy for his bereaved widow and children or from any possible prejudice against corporations.

You should only allow such a temporate sum of money as will compensate the widow and children for the loss of the husband and father. You will observe that the law of Arkansas gives no other damages than their own. They are not entitled to recover anything by reason of any physical or mental suffering on his part; and they are not entitled to recover in solace for their grief—only compensation in dollars and cents for their own loss in dollars and cents. As suggested by the supreme court of Arkansas, you take into consideration the man's age health and circumstances and condition in life, his earning capacity, his prospects of saving money for the benefit of his wife and children and every reasonable and sensible element which will show the value of his life to them, and after deducting a reasonable cost for his own personal expenses of subsistance and the like the balance would be their pecuniary loss.

You can see, gentlemen of the jury, that in the very nature of the subject the law has no delicate scales with which to measure such damages as you would groceries and drugs from a store. Necessarily the amount to be given must be left to the fair and impartial judgment of a jury. Taking into consideration all the elements which fairly should be considered in determining such a compensation, you have to deal out such damages as best you can.

Take the case, gentlemen of the jury, and consider of your verdict.

Special instructions from 1 to 15, inclusive, asked by plaintiff are refused for the reason stated as follows:

All the plaintiff's requests numbered from one to fifteen, inclusive, are refused as either unnecessary in view of the court's general instructions, as inconsistent therewith or as affected with infirmity of partisan requests that they overlook the case as made by the adversary proof and dealt only with the one side of it. The court has

submitted the issue of negligence to the jury by telling them that the accident is conclusive of it if they believe from the proof that McDade was killed by the sway pipe.

222 Defendant's special request were not read, as they were marked "given" or "refused" by the stenographer.

No. *L* has been modified and is given, except with a slight modification.

Mr. FITZHUGH: "Your honor, the plaintiff excepts to that portion of the charge where your honor states to the jury that, if the spout hung in such a position as to strike the plaintiff on the car, defendant is liable, 'unless he knew or by the exercise of ordinary care might have known of the danger.' I except to that feature of the charge wherever it appears. I am not able to designate the exact sentence or beginning of the sentence.

2nd. I except to the charge in that it fails to draw the distinction between the danger and the mere existence of the structure. Your honor should have drawn the distinction in your charge between a knowledge of the structure as it existed and the knowledge of the danger arising from the structure. It is one thing to know the existence of the structure and the angle at which the spout hung and another thing to appreciate or know the danger arising therefrom, and, in order to charge the plaintiff with negligence, there ought to be an appreciation on his part of the danger that existed as distinguished from the structure."

Judge HAMMOND: "I think you will find that none of the charges given by the court or those given by Mr. Wright are subject to that."

3rd. Plaintiff excepts to each of the special instructions given at the request of defendant. They will be found in the record. And to the giving of such of those as were modified by your honor.

4th. Plaintiff also excepts to the refusal of the court to give the special instructions requested by the plaintiff from one to 15 inclusive.

I want to call your honor's attention to this phase of the charge—the failure of your honor to tell the jury what would be ordinary—what would constitute ordinary care or negligence on the part of the deceased, and your honor should have charged the jury that they should take into consideration all the facts and circumstances surrounding him, and that negligence on his part, if any existed, would consist of his failing to do that which an ordinarily prudent person would have done under all the circumstances which surrounded him.

Judge HAMMOND: "Under Mr. Wright's special instructions you will see that I cover that point. Still, you may note that exception. I will say to Mr. Fitzhugh I don't think it will do you any good unless you have a proper instruction which embodies it."

223 Mr. FITZHUGH: "I think I have that in one of my special charges."

Mr. WRIGHT: "If your honor please, I except to that portion of your honor's charge in which your honor instructs: If the jury find that McDade was struck by the sway spout or the chain of the

spout, that this would be negligence *per se* upon the part of the company to have such a spout and its appliances so near the track as to be able to strike a brakeman on the car."

Judge HAMMOND: You may except to any part of the charge. I mean you may in your exception enlarge it so as to identify it.

Mr. WRIGHT: "I wish to except to the charge upon the subject of damages, on the ground that your honor has quoted from a case which is argumentative."

3rd. I except to the refusal of your honor to give those special charges that were given in their original form. I except to the modification of the court in those special instructions that were given, and also to the refusal of the court to give the special instructions asked that were not given.

There is just one point I wish to get in. I wish to change a special instruction just in one particular. That is, where the word "sway spout" is used, to add to it "sway spout and appliances."

Mr. FITZHUGH: "I don't object to that."

Judge HAMMOND: "I don't see any reason why I should give any further instructions, and you may say to the jury that I have no further instructions to give, and they may proceed to consider the case."

Special Instructions Requested by Defendant.

1 A.

If you believe from the evidence that the injury to McDade "was" the result of one or more distinct causes, viz.: either that he was struck by the sway spout at Goodwin station, or that in some other way he fell or slipped, without being struck by the sway spout; and from all the evidence in this case you believe that it is equally probable that he was not struck by the spout as it is that he — struck by the spout, then you should find for the defendant in this suit; and in order that the plaintiff may recover he must satisfy you by a preponderance of the evidence that the deceased was struck by the sway spout at the Goodwin tank.

224 "Given," note No. 1, with the modification of the word "was" in the second line to read "might have been."

1 B.

The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin station; that is, it was obliged to use ordinary care to select such an appliance, and to so construct it that it would not unnecessarily endanger its employés, whose duties required them to pass by it; but, as between the defendant and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade, as were in general use, that is all that can be required of the defendant; so in order that the plaintiff may recover in this case,

it is necessary for the plaintiff to convince you by the preponderance of the evidence that the construction and location of the water tank, or its appliances, were such as were not in general use throughout the country. So, if you believe from the evidence that the defendant did use ordinary care and prudence in the selection, arrangement and care of the water tank at Goodwin station, and that such a tank was one, which in the experience of the railroad business, was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and hence is the test of what is ordinary care.

Refused.

NOTE No. 2.—It is an issue of the defective construction actually used and not of the selection of an inferior appliance.

II.

Where there are several methods in general use—it being a matter of judgment depending upon surrounding conditions, the defendant has an absolute discretion to select according to its own judgment. The test of liability is not danger, but negligence,
225 and negligence can never be imputed from the employment of methods, and appliances and machinery, which are in general use in the business; so, if you believe from the evidence on some railroads the sway spout- of tanks were hung in a vertical position, and upon other well-regulated railroads the sway spout- upon water tanks were hung at an angle similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirements of the law, and no matter whether deceased was killed by coming into contact with the spout, or not, there can be no recovery in this case.

Refused.

NOTE No. 3.—The proof shows only one method, that of placing the spout far enough away from the cars not to injure the brakeman at work on them.

III.

The defendant did not undertake with McDade that it would use the very best water tank and appliances, nor was the defendant called upon to discard the same, if it was reasonably suitable for his business, though there were other water tanks that were safer; so, if you believe from the evidence that this tank and its appliances were reasonably suitable for the business and reasonably safe, you should find for the defendant.

Refused.

NOTE No. 4.—The proof does not bring the case within this request. See also last note above.

IV.

If you believe from the evidence that the sway spout upon the various well-regulated railroads of this country were hung at different angles, and projected towards the track at different distances; and you likewise believe from the evidence that the method of hanging the sway spout at Goodwin was in common use by many of the well-regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use.

Refused.

226 NOTE No. 5.—All angles and positions are intended to protect the brakemen and whatever minor considerations are involved in construction are subordinate to that one, hence it can only be negligence to endanger them.

V.

It is the duty of the master to furnish machinery and appliances reasonably safe and suitable for the use of the servant, that is, such as with reasonable care upon the part of the servant can be used without danger to him, except such danger as is incident to the business in which such instrumentalities are employed, so also it is the duty of the master to provide a reasonably safe place in which the servant may perform the work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the character of the employment, the location of the premises and their surroundings. There are employments that are of themselves necessarily dangerous in connection with which position can be made secure. In such case the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his service without exposure to dangers that are not within the obvious scope of employment as usually carried on. The master may, however, conduct the business in the way that seems to him best, although other ways may be less hazardous, and still be not liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risks of the more hazardous method. Therefore, the servant upon his part assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew or should have known or foreseen, unless such risks are obvious, or the servant has actual or presumed knowledge of the danger. It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the service in which he engages; and it is likewise his duty to protect himself against known dangers and such dangers as can, by the use of ordinary care, be ascertained;

and this duty is just as imperative upon him as that laid upon the master.

Refused.

227 NOTE No. 6.—See previous notes. So far as any part of this instructions is applicable it is covered by the general charge of the court.

VI.

If you believe from the evidence that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law as above given you that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew or by the exercise of the ordinary care should have known of the danger incident to the construction and location of the sway spout; and that after he knew or, by the exercise of ordinary care, should have known such fact, he voluntarily continued in the employment of the defendant company then the court charges you that he assumed the risk of whatever defect there were in the construction and location of the tank and its appliances, and there can be no recovery in this case.

Given with the modification: But the given danger must have been one open to ordinary observation and not one lurking or hidden from the view.

VII.

A servant of experience in the railroad business, who enters into the employ of a railroad company assumes all of the usual risks of the service, and those which are apparent to ordinary observation, and if he continues in the service with the knowledge of the character of the defective structure, and of the danger which may be apparent, he assumes the hazards incident to the situation. Likewise a servant assumes not only the risks incident to his employment, but all dangers which are obvious and apparent; and so, if he voluntarily enters into or continues in the service, having knowledge, or means of knowing, the danger involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury; so, if you believe from the evidence in this case that the deceased, McDade, was a man of mature years, and an experienced brakeman, and you further believe from the evidence that he knew, or by the use of ordinary care, should have known the dangers, to be apprehended from passing underneath the sway spout, situated as it was situated, and with this knowledge, express or implied, he continued voluntarily in the service of the de-

228 fendant company, then there can be no recovery in this case, although the defendant was guilty of negligence in the way in which it hung the sway spout.

Given as above.

VIII.

If you believe from the evidence that both the defendant company and McDade were equally competent to judge of the risks and haz-

ards incident to the passing of cars underneath the sway spout at Goodwin station, hung as it was hung prior to the death of McDade; and, if you likewise believe from the evidence that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so.

Refused. Note No. 7.

The master cannot thus transfer a share of his sole responsibility to the servant.

IX.

If you believe from the evidence that the deceased McDade had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin station prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to passing underneath the sway spout upon freight cars, and with his knowledge continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection the court charges you that knowledge is either actual or presumed, that is, in the law, McDade is presumed to have had knowledge of those facts which he should have known by the exercise of ordinary care.

Refused. See note No. 7.

X.

If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that prior to his death he had been in the employment of this railroad company for several months—a portion of which time he ran over what is known as the Western division of the road, and a portion of which
229 time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks of the Western division of the road, as well as the tanks on the Eastern division of the road, were constructed similar to (see 1st modification) the construction of the Goodwin tank; and that the sway spout on all these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine (see modifications) the dangers incident to passing underneath them upon freight cars. If you believe from the evidence that he should have had this knowledge, and with this knowledge continued in the service of the defendant company, then he is presumed to have assumed the risks, and there can be no recovery in this case. In this connection the court likewise charges you that you may take into consideration the frequency or the infrequency in which furniture cars of a like height

and width as the car upon which McDade was riding when killed, were used over the defendant road.

Given as modified.

1st. The words "similar to" being left out and the words "precisely as found in" inserted.

2nd. After the word determine this sentence inserted, "from his observation or experience while engaged in that business of the company."

3rd. Modification, follows the end of the paragraph as follows: And in this connection you should consider his opportunity for observation of any increase of danger by the use of such cars in their relation to this spout at Goodwin or the other spouts on the road.

XI.

If you believe from the evidence that a person of McDade's experience and opportunities for observation should, by the exercise of ordinary care, have foreseen that the use of the Goodwin tank, as it existed before his death, would or could have been reasonably expected to have resulted in injury to a person situated as he was situated, upon the night of the accident, then the plaintiff cannot recover.

Given.

XII.

If you believe from the evidence that the sway spout at Goodwin station was not such a sway spout as in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe from the evidence that neither the defendant nor the deceased should have, by the exercise — ordinary care, known of the danger incident to the construction and location of the spout, then there can be no recovery.

Refused.

NOTE.—It is *as* the master's duty to know.

XIII.

The defendant is not liable for an injury sustained by its servant in the course of his employment when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence.

Refused.

NOTE.—See note above.

XIV.

The defendant had a right to expect, and it was the duty of McDade that he would use, reasonable care to examine his surroundings and all of those appliance- of the road, from which, by the use of ordinary care, he should have known might have endangered his safety, and the defendant has a right to rely upon the probability

that any one would know what was generally to be seen by his own observation.

Given.

XV.

It was the duty of McDade to use ordinary care to observe and ascertain whether there was any or what were the dangers that were incident to his employment as a brakeman, and he must be held to have ascertained and known of all these dangers as ordinary care would have disclosed. There are certain correlative duties upon the part of the employé to be reasonably observant of the machinery with which he might come in contact and to report any defects he may discover therein to the employer. Another is to use ordinary care to avoid injury to himself. While an employé has the right to presume that his employer has discharged his duty, yet this rule does not exempt the employé from the duty of making a prudent and reasonable use of his faculties or of heeding with due care defects which are open and visible to ordinary observation; so, if you
231 believe from the evidence that McDade failed to use ordinary care in any of the particulars mentioned, in this instruction he cannot recover, although you believe that the defendant was guilty of negligence upon its part.

Given, although it is a repetition of instructions already given.

XVI.

The defendant in the erection, construction and location of the Goodwin tank was only required to use reasonable care to furnish a safe tank, and was not required to furnish a tank that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their part; so, if you believe from the evidence that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting or standing on the car, then you should find for the defendant.

Refused.

NOTE.—There is not the least proof to show that he was not using ordinary care in the matter of position; but on the contrary, all tends to *this* that he was.

XVII.

If you believe from the evidence that McDade knowingly select a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him, and he was thereby injured, then he is guilty of contributory negligence and cannot recover, even though you believe that the defendant was likewise negligent.

Refused.

See note to No. 16.

XVIII.

If you believe from the evidence that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more — which was perfectly safe, and one of which *as* subject to danger and risk, and he voluntarily chose the latter and was injured, he was guilty of contributory negligence, and cannot recover.

Refused.

See note to No. 16.

232

XIX.

While the evidence shows you that on ordinary occasions it is customary for brakemen to sit upon the side of the car, you are to — from the evidence whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed Goodwin tank; and in order to determine this question you should take into consideration all of the facts of the case. If you believe from the evidence that the engine whistled for Goodwin tank, that McDade had been over the road many times before, and had passed Goodwin tank; that he had an opportunity to observe the danger and risks incident to the way in which the spout was hanging; and if you likewise believe that an ordinar-y prudent man situated as McDade was situated would have observed such risks and dangers, and you likewise believe that an ordinarily prudent man, from his familiarity with the road and the signals given, should have known and recollected that he was passing the Goodwin tank, and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position with perfect safety—and, in short, from all the facts and circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence.

Refused.

NOTE.—This request overlooks all the adverse proof, not disputed, that he was required to be on that side to give the go-ahead signals, and was engaged in keeping a lookout for others. This subject to the infirmity mentioned in the not refusing the plaintiff's instructions.

XX.

If you believe from the evidence that McDade was an experienced brakeman before he entered in the service of the defendant; that he was a man of mature years and capable of observing whether or not a sway spout was dangerous or not, and you further believe that whatever dangers were incident to the use of the Goodwin tank and its appliances were just as open and obvious to McDade as they were to the defendant company, then there was no duty incumbent upon the defendant company to warn McDade with regard to dangers.

Refused.

See note to No. 8.

233 XXI.

Upon the question of warning the court charges you that, in order that the defendant may be charged as negligent upon the ground of a failure to warn and instruct McDade as to the dangers connected with his employment, it must be shown by a preponderance of evidence that the defendant knew, or, by the exercise of ordinary care and observation, might have known that the servant was inexperienced and of immature judgment; and, in the absence of evidence that the master knew of the inexperience of McDade and of his ignorance with his use of the Goodwin tank and its appliances, the jury cannot be permitted, in considering this question, to rely upon the mere inference (see modification below) and upon such circumstances upon this point, must find in favor of the defendant.

Given, with the following modification: After the word inference this later part was left out, and the following inserted: "The proof in this case shows no facts calling for any specific warning by the company of any danger in this spout, and this jury need not consider that subject."

Circuit Court of the United States, Western District of Tennessee.

LAURA McDADE ET AL.
vs.
CHOCTAW, OKLAHOMA & GULF RAILWAY CO. } No. 3574.

Instructions Asked by Plaintiffs. Filed Feb'y 6, 1901.

All the plaintiffs' requests, numbered from one to fifteen, inclusive, are refused, as either unnecessary in view of the court's general instructions, as inconsistent therewith, or as affected with the common infirmity of partisan requests that they overlook the case as made by the adversary proof and deal only with the one side of it. The court has submitted the issue of negligence to the jury by telling them that the accident is conclusive of it if they believe from the proof that McDade was killed by the sway pipe.

234 I. The court charges the jury that among the positive duties resting upon the master to the servant is the obligation to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require in providing the servant with safe machinery and suitable instrumentalities, and a reasonably safe place in which to work, and the negligence of the master in this respect is not one of the perils or risks assumed by the employé in his contract of employment, and this duty imposed by law on the master to provide reasonably safe places for their employés to work is a continuing duty, and requires the master to use ordinary care to keep them safe. If they become unsafe through his neglect or are made unsafe through his act, he is liable in damages to a servant who is injured thereby, if the servant himself is free from contributory negligence; and the court charges you, as applicable to the facts of this case, that the defendant railroad company was bound to

observe all ordinary and reasonable precautions to keep its road and structures erected near the same for its use in such condition as to make it reasonably safe for employés while in the discharge of their duty on top of freight trains of the defendant company; and the deceased, John I. McDade, upon entering the service of said company as a brakeman had a right to assume that the defendant railroad and its appurtenances were so constructed as not to unnecessarily expose him to danger and to render him reasonably safe while in the performance of his duties.

II. The court further charges the jury that the brakeman and other servants of the railroad company, when entering the service, assumes only such risks as are incident to the employment or as necessarily attend the business when conducted with ordinary care and prudence, but he does not agree to assume the risk arising from the defendant's negligence, for the neglect of the company to perform duties by law devolving upon it is not a peril which a servant assumes, and the court charges the jury that it is the duty of a railroad company to place its water tanks and the appliances used in connection therewith at a reasonably safe distance from the track to the end that they will not be unnecessary dangers to the employés in operating the trains; and in this case if the jury believe from the evidence that the water tank at Goodwin, and the appliances connected therewith, were placed at such a distance from defendant's track as to cause the sway pipes to hang so near as to be unnecessarily dangerous to brakemen riding on the top of
235 cars in the discharge of their duties and in the exercise of reasonable care and prudence, and that as a proximate result of the act of the defendant railroad company in permitting said sway pipe to hang in such position as was unnecessarily dangerous to employés riding on the top of defendant's trains while passing Goodwin, the deceased, John I. McDade, while in the discharge of his duties as brakeman and while in the exercise of ordinary care, was, on the night of August 19th, 1900, knocked from a furniture car on which he was riding by said sway pipe, and as a result of said blow produced by coming in contact with said pipe, was killed, then plaintiffs are entitled to recover in this case.

III. The court charges the jury that while the law does not require a railroad company to adopt such water tanks and appliances as may conform to the latest standard of the arts, or to use a particular kind which may have been adopted by other roads, yet the law does require that they shall use ordinary care, in view of the risks involved both in the construction of such tank appliances and in the location, maintenance and inspection thereof, as will afford reasonable safety to its employés while in the discharge of their duties; and if the evidence satisfies the jury in this case that on other well-regulated railroads such water tank and its appliances are so constructed and maintained as that when not actually in use the sway pipe constituting a part of the appliances connected with said tanks, will not endanger the safety of the brakeman when on any part of any car in the discharge of his duty, and you further find from the evidence that the sway pipe constituting a part of the ap-

pliances of the Goodwin tank was not so maintained by the defendant company, but that for some time prior to the death of the deceased, John I. McDade, said sway pipe had hung at such close proximity to passing trains as to expose brakemen employed by defendant to unnecessary dangers while riding on the top of passing cars in the discharge of their duty, and that such dangers might have been removed by the exercise of reasonable care in the construction and maintenance of such appliances, and that as a result of the negligence of the defendant company in regard to said appliances the said John I. McDade, while in the discharge of his duty as a brakeman, and without fault or negligence on his part, was struck by said sway pipe and knocked from the car on which he was riding, from which injuries so received his death resulted, then plaintiffs are entitled to recover, unless you find that the deceased not only knew of the existence of said pipe, but of the actual danger to which he was exposing himself, and notwithstanding such knowledge placed himself in a position of peril.

236 IV. In this connection the court charges the jury that it is incumbent upon a railroad company in the discharge of its duty as a master, not only to provide instrumentalities for its employés which are suitable and safe, but also to use reasonable diligence to keep them so; and necessarily incident to these obligations is the duty of frequent inspection, and the employé has a right to rely upon the assumption that the company has discharged its duty in these particulars. The duty of the servant is to take notice of such defects only as are open to his observation; the duty of discovering latent defects by careful inspection devolves upon the company. The employé has a right to presume that his employer has provided a proper and reasonably safe place for discharging the duty incumbent on him, and he has a right also to apply this rule, even when appearances would indicate neglect of duty by the master, unless such appearances are so conclusive as to overcome the presumption of good faith and of the superior knowledge of the necessities of the employment on the part of his employer, and knowledge of facts which involves a knowledge of danger does not necessarily couple a knowledge of the danger itself. Thus, a brakeman may have knowledge of the fact that a water-spout hangs at an angle towards the track, but unless such brakeman also has knowledge that said sway pipe is in such close proximity to the car on which he may be riding as to endanger his safety while in the discharge of his duty, he cannot be held to have assumed the risks incident to the existence of said sway pipe.

V. The court charges the jury that if you believe from the evidence that the deceased, John I. McDade, was killed by coming in contact with a sway pipe which constituted a part of the appliances of the water tank at Goodwin, maintained by the defendant railroad company, while he was riding on the side of a furniture car in one of defendant's trains, and while in the discharge of his duty, and in the exercise of ordinary care and caution on his part, and that the defendant by maintaining a sway pipe in such a position unnecessarily exposed the deceased to danger and that his death would not

have occurred except for the negligence of the defendant railroad company, then the plaintiffs are entitled to recover, even though the evidence shows that the said deceased had made other trips over said railway and has passed said tank and had knowledge of the existence of said water pipe, unless the evidence further satisfies you that he knew, or ought reasonably to have known the
237 precise danger to him in the course of his employment, of the water-spout being too near the track and saw fit, notwithstanding, to continue in the employment. In other words the evidence must show positive knowledge or reasonable means of positive knowledge on his part of the precise danger assumed, not a vague surmise of the possibility of danger.

VI. The court further charges the jury that if the evidence shows that the death of the deceased was proximately caused by his coming in contact with the water-spout connected with the tank at Goodwin, Arkansas, while he was riding on a furniture car in the defendant's train, in the discharge of his duties and without negligence on his part, and that the defendant had unnecessarily exposed him to danger, by maintaining said sway pipe in such a position, and by the exercise of ordinary care said defendant could have prevented the injury which resulted in the death of the deceased, then the plaintiffs are entitled to recover, even though the evidence may show that the deceased knew said water-spout and others at adjacent stations were close to the track, if he did not know it was as close as it in fact was, for it cannot be said, as a matter of law, that brakemen on railroad trains passing adjacent objects in rapid motion, with their attention fixed upon their duties, must, without express proof of knowledge, be charged with notice of the precise relation of said objects to the tracks.

VII. The court further charges the jury that where a tank and its appliances, including the sway pipe, are constructed in such dangerous proximity to the track as that the sway pipe when not in use exposes brakemen in the discharge of their duty to unnecessary danger, such defect is not one of the risks assumed by a brakeman, and the fact (if such be the fact) that brakeman while on the train in the discharge of his duty could see said tank and spout a considerable distance does not raise the presumption that he knew its exact distance in inches from the track or passing cars, and in the absence of such knowledge the brakeman may rely upon the presumption that such structures are not erected so as to endanger his life while in the discharge of his duty, and in the exercise of ordinary care.

VIII. The court further charges the jury that an open and visible risk is one so patent that one familiar with the business would instantly recognize it; it is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. The servant is expected to observe such objects only
238 in the absence of notice, as would in an instant convince him of their danger. It is not expected of a brakeman that he should, while in the discharge of his duty on a moving train, carefully measure the distance between a sway pipe and the side of a

car on which he may be riding and where it is customary for brakemen to ride. This is the duty of the railroad company. The servant has a right to assume that a sway pipe connected with the water tank is at a reasonable safe distance in the absence of anything to excite special apprehension on his part. It is the duty of a railroad company to furnish its employés a reasonably safe place to work, having regard to the kind of work and the place and condition under which it must necessarily be performed. Some kinds of work are necessarily attended with dangers to the employés which the employer cannot remove or abate, by the exercise of reasonable care and diligence, and when this is the case the employé takes upon himself all the risks incident to the employment. But the employé does not take upon himself extraordinary and unnecessary risks—dangers which do not inhere in the business, but are the result of the want of reasonable care and diligence on the part of the employer. Where, by the exercise of ordinary care and diligence, the employer can make safe or render less dangerous the place where the employé is required to work, it is his duty to do so, and, failing in his duty, he is guilty of a continuing act of culpable negligence. It may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, which ordinary prudence in view of the risks involved, dictates, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions, without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon, and if the evidence in this case shows that the death of John I. McDade was due to the failure on the part of defendant to take such precaution in the construction of the Goodwin tank, and, if the jury further believe that owing to the height at which the sway pipe hung over passing trains, — the brakemen who in the discharge of their duty, were necessarily on top of the defendant's freight car, was unnecessarily increased, and, if they further believe that the death of said John I. McDade was caused by a collision with the sway pipe attached to said tank whilst he was riding on top
239 of furniture car No. 28149, I. C., in the performance of his duty as a brakeman in the defendant's employ, and at a time when he was in the exercise of ordinary care himself, then the defendant is liable to the plaintiffs in this case, and the jury should so find.

IX. In the construction of a water tank and in furnishing appliances for the elevation of the sway pipe, it is the primary duty of every railroad company that they are not so close to the track, and that the sway pipe does not hang so low as by any possibility, to strike a brakeman or other employé who may be on top or on the side of a passing train in the discharge of his duty.

X. Such a structure might be used for years and years in too close proximity to the track without attracting attention because the unhappy combination of a brakeman sitting on the eaves of a furniture

car, 13 or 14 feet high at the precise moment of its passing the sway pipe of this tank might never have before occurred. It cannot be required of a brakeman that he shall go about upon the line of a railroad upon which he is operating and lay a foot rule to all the structures of this kind and see whether or not they hang so near as to make it necessary that he should be watchful when he is riding on top of a box car and, although the deceased was aware of the fact that the tank was there, it does not follow that he was aware of the fact that the sway pipe was a few inches more or less too near the top of the car upon which he was riding, and he had a right to rely upon the belief that the defendant would not allow the sway pipe to hang so near the top of a passing car as to injure or strike brakemen riding thereon in the discharge of their duty.

XI. The court further charges the jury that trainmen having no functions to perform in respect of the construction and maintenance of the roadway and adjacent structures, such as water tanks and appliances, have a right to assume their adaptation and efficiency in all respects to a safe discharge of their duties in another and distinct branch of the general service, and are not held to a knowledge which has never in point of fact been actually acquired by them of the dangerous nature of adjacent structures erected or permitted by the company. The duty of the railroad company to this class of employés, such as brakemen, is to maintain its roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon such employés by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The onus
240 of inquiry or investigation is not upon them, but upon the company. If, as a matter of fact, however, they know of unsafe conditions in any of these particulars, and continue in the service, with knowledge of the peril caused by said defects, they assume the additional risk; otherwise, not.

XII. The court charges the jury that ordinary care on the part of a railroad company, as between it and its employés implies not simply the degree of diligence which is customary among those entrusted with the management of railroad properties, but such as having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from its negligence, may be fairly commensurate with the perils or dangers likely to be encountered.

XIII. The court further charges the jury if they believe from the evidence that deceased, John I. McDade, was injured by the danger which was caused by the negligence of the defendant in unnecessarily exposing him to a water-spout connected with Goodwin tank, then the plaintiffs are entitled to recover, unless the defendant has shown by a preponderance of the evidence that McDade knew of such unusual and unreasonable danger, if any, and comprehended its nature before the accident happened and that notwithstanding such knowledge and in view of all the circumstances should have avoided the same while passing at night on a train going 20 or 25 miles per hour, and while his attention was fixed on the discharge

of his duties, if the evidence so shows. There is no presumption that McDade assumed an unusual risk which would arise from the negligence of the defendant, if any, in this particular, and the burden of proof is on the defendant to show affirmatively that he did assume such risk to the same extent that it is on the defendant to show any other contributory negligence on the part of the deceased.

XIV. In considering both the question as to whether the deceased, John I. McDade, at the time of or shortly prior to the accident, had knowledge of such unnecessary danger, if any, on account of the location of said tank and water-spout, — whether he assumed the peril after acquiring knowledge thereof, and in considering the question of contributory negligence, if any, on the part of said McDade, the jury should look to all the facts and circumstances, proven in the case and are authorized to consider whether brakemen operating railroad trains, passing adjacent objects in rapid motion, with their attention fixed upon their duties, can reasonably be charged with notice of the
241 precise relation of such objects to the tank, and even with actual notice of the dangerous proximity of such objects, if the proof shows these facts and circumstances to exist, whether it would be reasonable to expect brakemen while engaged in their duties to retain in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable as well by night as by day, with notice of the precise relation of the train to adjacent objects. And in this case, if the jury believe from the evidence that the deceased, John I. McDade, was killed by coming in contact with the water-spout connected with the tank at Goodwin, Ark., under the control of the defendant, while the said McDade was passing said tank on one of defendant's trains in the performance of his duty as a brakeman, that he would not have met his death but for the fact that said water-spout was permitted to hang in such close proximity to a passing furniture car, being carried by defendant in one of its trains as to be unnecessarily dangerous to brakemen on said car in discharge of their duty, then the court charges you that plaintiffs are entitled to recover, even if the evidence shows that the said McDade had passed said tank on defendant's train eight or nine times previous to his death and had seen the position of said water-spout, if you also believe from the evidence that at the time he was struck by said water-spout he was on a furniture car of defendant's train which was passing said tank at 20 or 25 miles per hour, that his attention was fixed upon his duties as brakeman, and that it would be unreasonable to expect him, while thus engaged in the discharge of his duties, to retain in his mind a knowledge or recollection of the proximity of said spout to the furniture car, in the train passing at night, and that under all the circumstances surrounding him he exercised such care as an ordinarily prudent person, engaged in the same business, would have exercised under similar circumstances.

XV. It is claimed by the defendant that McDade must have known

the dangerous proximity of the water-spout in question to a train passing Goodwin tank, if such is disclosed by the evidence, and should have so acted as to avoid being struck by the same, and that failing to do so, he is guilty of contributory negligence. The question of the negligence is for the jury to decide under all the evidence in the case; even if it appeared that McDade knew prior to the accident the danger arising from the proximity of the spout to the passing train, such knowledge, if proven, should be con-
212 sidered by you in connection, with all the other circumstances, but is not necessarily decisive of the question, for if the service to be performed by McDade was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, you should consider whether it could reasonably be expected that he should always bear in mind the existence of the danger arising from the proximity of said spout or be prepared at all times to avoid it. Taking all the facts into account, it is for you to determine whether McDade was guilty of such negligence as contributed directly to his death. If you find that he was not guilty of such negligence and the accident was caused by the neglect of defendant, then your verdict should be for the plaintiff.

"*Defendant's Exceptions.*"

Filed April 29th, 1901. J. B. Clough, Clerk.

This cause came on to be tried in the United States circuit court for the western division of the western district of Tennessee, before E. S. Hammond, judge, and a jury, where the following proceedings were had, to wit:

The plaintiff in order to sustain the issues upon her part introduced the following evidence:

(Here quote the stenographic report of the evidence of the plaintiff now in the hands of the clerk, together with the depositions of C. A. Hollwell and W. D. Kennedy.)

The defendant, in order to sustain the issues upon its part introduced the following evidence:

(Here quote the stenographic report of the defendant's evidence now in the hands of the clerk.)

This was all the evidence in the case.

At the conclusion of all the evidence in this case, the defendant requested a peremptory instruction in its favor, which request was refused by the court, and to which the defendant then and there excepted.

Before the court charged the jury the defendant requested the court to give in charge the following special instructions:

(Here insert the special instruction- as requested by the defendant in their original form.)

The court then charged the jury as follows:

(Here insert the written charge of the judge.)

After the judge had given his general charge, the defendant re-

quested the court to give special instruction No. 1–B, where-
243 upon the court refused the special instruction No. 1–*b* (to which the defendant then and there excepted.)

The defendant then requested the court to give in charge special instruction No. 2. The court also refused special instruction No. 2, requested by the defendant, to which the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. 111. The court refused special instruction No. 111, to which action of the court the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. 4. The court then refused special instruction No. IV, to which action of the court the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. V. The court then refused special instruction No. V, to which action of the court the defendant then and there excepted.

The court then gave in charge special instruction No. VI, but modified the same as follows: By adding to the end of the said special instruction the following sentence: "But the given danger must have been open to ordinary observation, and not one lurking or hidden from view," making the whole instruction as given in the charge of the jury read as follows: "If you believe from the evidence that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law as above given you that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew, or by the exercise of ordinary care should have known, of the danger incident to the construction and location of the sway spout; and that after he knew, or by the exercise of ordinary care should have known, such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risks of whatever defects there were in the construction and location of the tank and its appliances, and there can be no recovery in this case, but the given danger must have been one open to ordinary observation and not one lurking or hidden from view." To which modification defendant excepted.

The defendant then requested the court to give in charge special instruction No. VIII, which the court again refused, and the defendant then and there excepted.

The defendant the- requested the court to give in charge
244 special instruction No. IX, as above set forth, which the court again refused, and the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. X, in its original form, as above set forth, and the court gave it in charge as modified in these particulars, to wit:

First, the words "similar to" were struck out by the court, and in their place "precisely as found in" were inserted. Again, there was interpolated after the word "determine" this clause, to wit:

"From his observation or experience while engaged in the business of the company," making the language of this instruction as given to the jury read as follows:

"If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that prior to his death he had been in the employment of this railroad company for several months—a portion of which time he ran over what is known as the Western division of the road, and a portion of which time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks on the Western division of the road, as well as the tanks on the Eastern division of the road, were constructed precisely as found in the construction of the Goodwin tank; and that the swap spout on all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, been able to determine from his observation or experience while engaged in the business of the company the dangers incident to passing underneath then upon freight cars."

The rest of the language used in the instruction is not repeated, because no exception is made to the modification contained therein.

The defendant the- requested the court to give in charge its special instruction No. XII, which the court refused, and to which action of the court the defendant then and there excepted.

The defendant then requested the court to give in charge the 13th special instruction as above set forth, which was refused by the court, and the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. XVI, which was refused by the court, and the defendant then and there excepted.

245 The defendant the- requested the court to give in charge special instruction No. XVII, which was refused by the court, and the defendant then and there excepted.

The defendant the- requested the court to give in charge special instruction No. XVIII, which was refused by the court, and the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. XIX, which was refused by the court, and the defendant then and there excepted.

The defendant then requested the court to give in charge special instruction No. XX, which was refused by the court, and the defendant then and there excepted.

The court, after he had delivered his general charge, did give the jury the following special instructions requested by the defendant, in their original form above set forth, to wit: No. VI, as modified; No. VII, in its original form; No. X, as modified; No. XI, in its original form; No. XIV, in its original form; No. XV, in its original form, and No. XXI, as modified, but of which no complaint was made.

Then the defendant excepted to that portion of the general charge of the court where this language is used:

"But if you find from the evidence that his death was caused by collision with the overhanging water-spout, either by a blow sufficient of itself to kill him, or by being so dazed or disconcerted by a blow from the spout or the downhanging chain that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statutes of Arkansas, which has been re[illegible] in your hearing."

The defendant also excepted to the following portion of the judge's general charge, which is as follows:

"I shall not delay your consideration of this case by reviewing any arguments of facts or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the case analogous to this in fact and law, but the court here has taken its responsibility as once before in another case, to decide that it is negligence of itself for a railroad to so construct such appliances as that we have before us that will injure the brakeman upon its trains. It is so simple a task, one so devoid of all exigencies of expenses, necessity or convenience, so free from any consideration of skill, except that of the foot rule, and so entirely destitute of any element of
246 choice or selection, that — they do not make such a construction safe for the brakeman on the train is a conviction of negligence. Therefore, I submit the case to you upon the plain proposition above mentioned.

I repeat:

First. Was McDade killed by the collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

Second. Did he know of the danger at the time, or might he have known it, if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident?

If you find both of these propositions in favor of the plaintiff, they should recover."

The case was then given to the jury, and they retired to consider of their verdict, and after consideration they delivered a verdict in favor of the plaintiff and assessed her damages at $5000.00.

A motion for a new trial was made by the defendant, and was overruled by the court, to which action of the court the defendant then and there excepted.

Then a motion in arrest of judgment was made by the defendant, and was likewise overruled by the court, whereupon the defendant then and there excepted to the overruling of said motion in arrest of judgment, and likewise excepted to the overruling of the motion for a new trial, and prayed an appeal to the United States circuit court of appeals and also petitioned the court for a writ of error in this regard, which, being granted, the defendant tenders this its bill

of exceptions which is signed and sealed and ordered to be made a part of the record.

E. E. WRIGHT,
Attorney for the Choctaw, Oklahoma & Gulf Railroad Company.

O. K.
WATSON & FITZHUGH,
Attorneys for Laura L. McDade et al.

E. S. HAMMOND, *Judge.*

247 Circuit Court of the United States, Western District of Tennessee.

LAURA LOUISE MCDADE ET AL.
vs.
CHOCTAW, OKLAHOMA & GULF RAILROAD CO. } No. 3574.

Assignment of Errors. Filed May 20, 1901. *Filed, J. B. Clough, Clerk.*

I. The court erred in overruling the defendant's motion made at the close of the evidence for a peremptory instruction in its behalf.

II. The court erred in admitting, over the objection of the defendant, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the plaintiff, to wit:

"Q. Mrs. McDade, what was your husband earning at the time?

A. $70.00 a month.

Mr. WRIGHT: That is objected to unless she knows of her own knowledge.

Said objection was overruled by the court, to which ruling the defendant excepted.

A. Well, they sent me a check.

Q. Who did?

A. The Choctaw, Oklahoma & Gulf Railroad Company after he was dead. I have that at home. It says: This is for 12 days' work; and that was for $37.75.

Q. They sent you a check for $37.75, which they said was for 12 days' work?

A. Yes, sir.

Q. Mr. WRIGHT: That is objected — on the ground that it does not show his earning capacity, but merely what he earned for 12 days."

Said objection was overruled by the court and defendant excepted.

III. The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of C. A. Hollowell, a witness for the plaintiff, to wit:

1st. "Q. Where was he standing to the best of your knowledge at

the time he was giving this signal as the train was pulling into Goodwin?

A. From the position of his lamp and the signal, I should judge he was probably sitting on the edge of the car.

248 Q. He was sitting at the time you gave this signal?

A. I should judge this was his position at this time."

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

2d. "Q. How long had the tank been in the condition that it was in the night that this train passed by?

A. As far as I know, ever since I have passed there.

Q. State whether or not you had ever made any observation in regard to it personally.

A. Nothing, only to be careful to be out of the way of it.

Q. You had to be careful to keep out of the way of it, did you?

A. Yes, sir."

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

3d. "Q. State what is the usual custom of the head brakeman on your road, and others, in regard to their position on the top of the car when passing stations.

A. Well, there is no special position at all. They use their own pleasure in regard to that.

Q. What custom, if any, exists in regard to their sitting on the side of the car?

A. That is the customary position always of a person riding on top.

Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19th, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

A. Well, I will answer that he was in the discharge of his duties.

Q. He was, at the last time you saw him, in the proper discharge of his duties?

A. Yes, on top of the train, looking after the train."

These questions and answers were objected to by counsel for defendant, and the objection being overruled, the defendant excepted.

4th. "Q. State what his character was with reference to his efficiency or inefficiency, carelessness or prudence.

A. He was always very careful in handling trains, doing work and anything of that kind."

To this question and answer defendant objected, which objection was overruled and defendant excepted.

5th. "Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. Mc-

249 Dade should have been on the side of the ladder, either ascending or descending, as the train was pulling through Goodwin.

A. I don't know any reason that would necessitate his being on the ladder at all at that time."

To this question and answer defendant objected, which objection was overruled and defendant excepted.

6th. "Q. State whether or not, if he desired to get in such a position, that is, to descend on the ladder for the purpose of looking at anything or making any investigation, what is customary with reference to carrying his lantern.

A. He would not have left his lantern there, if he had went down the ladder. He would have taken his lantern with him.

Q. His lantern was, as you have stated, in a position?

A. That he would naturally place it in after he had finished giving the signal.

Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab-iron?

—. It would be evidently when he leaned out to pass the signal to the engineer that he would hold the grab-iron with his left hand with his lantern in the right, after being in that position passing it from the side of the car making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

These questions and answers were objected to, and which objection being overruled, defendant excepted.

IV. The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff, to wit:

1st. "Q. Mr. Briggs, describe the relative positions, as near as you can, of the water-spout with reference to a passing train.

A. Well, it should be cleared.

Q. How much should they clear?

A. I cannot tell you exactly; I have never located a tank myself. There is a regular standard that the road department conforms to. I know that they must absolutely clear it.

Q. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

A. So that it will clear everything.

Q. What do you mean by everything?

A. Anything in the way of the car, or a person on top."

250 The defendants objected to the admission of these questions and answers, which objection was overruled by the court and the defendant excepted.

2d. "Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position when not in use, what would that show?

A. It would show that the weight struck this cross-piece too soon, or that the chain is too long. I could give further information how this does happen.

Q. Do that.

A. Oftentimes the spouts get rammed up or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in making the

spouts in the shop they are not particular in getting the same size, so the band will go a little further and then won't go down so far, and if they won't go down so far, the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

All of which evidence was objected to, and upon the court overruling said objection, defendant excepted.

3d. "Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length, and the band around the spout is in proper condition. Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as two feet and 8 inches—in a length on nine feet—the spout being nine feet long—the slant two feet and 8 inches in that length. Please state whether that would conform to the present state of the art and of the standard tanks and spouts.

A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled and the defendant duly excepted.

"Q. What is the cause of it being at this angle, so that it would not clear the car?

A. Different causes; one, the spout might have been damaged and they had to change it. If the ring of the spout is here and they get another spout with the ring here, that makes the chain too long, and it hangs over. They might put new chains on, but that seldom happens. But the main cause is the spout gets mashed. The fireman will give the engineer the signal and the first thing he goes and smashes it, and they send another spout and the men are not particular enough about putting this
251 band in the right place, and that will control the position in which the spout hangs."

This last answer was objected to by the defendant; the objection was overruled, and the defendant excepted.

V. The court erred in admitting the following evidence found in the testimony of W. D. Kennedy, to wit:

1st. "Q. Now, from the way the lantern was moving at the time you saw him giving the signal, what was your best impression at that time as to his position on the car?

A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on the brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down because it is easier to ride sitting that it is standing."

Said question and answer were objected to by the defendant; the objection was overruled, and the defendant excepted.

VI. The court erred in admitting the following evidence found in the direct testimony of Dr. Frank D. Smythe, a witness for the plaintiff, to wit:

1st. "Q. Doctor, assuming that the man was sitting on the side of the edge of the car with his legs hanging over the side of the car,

the car being between 13 and 14 feet high, and being a part of a train which was running at a rate of speed, say, between 20 and 25 miles an hour, that he was found on the side of the track, on which the train was moving, in the condition and with the injuries such as I have above described to you, please state whether or not, in your opinion, if you have an opinion of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on level ground."

Counsel for defendant objected to said question, which was overruled, and defendant excepted.

"A. It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible."

Counsel for defendant objected to what is possible.

"Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries, such as I have described to you, could, or not, have been produced by falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all I can
252 say. My opinion is that a single blow could not have produced such an injury as you have described."

2d. "Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature, or surface, as to receive impressions of footprints, whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that."

To this question counsel for defendant objected, the court overruled the same and the defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate of speed and coming in contact with the ground, without some interruption from the fall. I can readily see how a very extensive injury could result, but I cannot see how it would produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it while the train was running 20 or 25 miles an hour, be such an instrument as would produce such injuries?

A. There comes the question again. I don't think a blow from the pipe would produce it all, but I am satisfied that a blow from the pipe would produce the injury to the jaw-bone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury to soft parts."

To this question and answer defendant objected, and upon the court overruling the objection, duly excepted.

3d. "Q. In your opinion, please state whether or not the conditions and injuries described to you could or not have been produced

by a combination of blows, viz., the blow from such a pipe, where the party's head comes in contact with it, when he is on a train running at 20 to 25 miles an hour, and is knocked from the car, after such blow is received, falling to the ground?

A. Yes, sir, I think the combination of blows would account, under the circumstances, for the condition the man was found in.

Q. In your opinion, neither the falling from the car nor the blow from the pipe under these circumstances alone could produce that combination of injuries?

A. Not alone, no, sir. I am not prepared to say what happened when he fell."

To this last question and answer defendant objected, which objection was overruled, and defendant excepted.

253 VII. The court erred in admitting the following evidence, over the objection of the defendant, found in the direct examination of Dr. Webb, a witness for the plaintiff, to wit:

"Q. Please state whether or not the injuries such as you have described and in addition assuming that the jaw-bones were crushed and that he had a large scalp wound on the left side of his head near the rear, whether such injuries could have been produced by a fall from a car 13 to 14 feet in height running at a rate of speed 20 to 25 miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether those injuries could have been produced alone by such a fall.

A. I don't hardly think it could.

Q. Please state whether or not such injuries as you saw, and in addition thereto the injuries which I have just described to you, could, in your opinion, have been produced by the party coming in contact with an iron pipe about ten inches in diameter, the pipe striking him on the head, while in the position on the side of the car, moving at from 20 to 25 miles an hour, and his falling thereafter to the ground.

A. Yes, I think it would, all right.

Q. But the mere fall under these circumstances, in your opinion, could not have produced those injuries?

A. I don't see how it could; it might have done it."

To all of this evidence of Dr. Webb, the defendant objected, and upon the objection being overruled by the court, the defendant excepted.

VIII. The court erred in admitting, over the objection of the defendant, the following evidence contained in the testimony of Frank Sayers, on cross-examination, a witness for the defendant, to wit:

"Q. Had this upright to which the pulleys are attached, and through which the chain passes, which connects with the water-spout, been elevated?

A. It had not been done at that time.

Q. How did you know it hadn't?

A. Because I noticed it after it was done.

Q. When was it done?

A. Eight or ten days after I made those measurements.

Q. Did you see it done?"

Counsel for defendant here objected to any change being shown in the appliances connected with the spout after the accident occurred.

"Judge HAMMOND: What day of the month did you make this measurement to which you have testified?

A. It was along about the 3d or 4th of September.

254 Judge HAMMOND: "This accident happened on the 18th of August?

A. Yes, sir.

Mr. FITZHUGH: Do you know the date when these changes were made?

A. No, sir, I don't know the date, but, passing there the first time after it was made, I noticed the difference in the spout.

Judge HAMMOND: Did you make your measurements before you noticed the change?

A. Yes, sir."

Counsel for defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

2d. "Judge HAMMOND: At the time you made these measurements, did you notice any changes in this structure as you knew it before?

A. If there were any changes they were so slight I could not detect it.

Q. Was that the time 8 or 9 days after you took the measurement that you say you noticed the change?

A. No, sir, I noticed it on the train in passing, but did not stop off.

Q. When was that?

A. I could not give it.

Q. How many days after you took the measurements before you went back?

A. It was probably two weeks, maybe more.

Q. Were you not there 8 or 9 days after you took the measurements at Goodwin, Ark., after this change—after you took these measurements?

A. I am not certain. I- would be somewhere about that time.

Defendant again objected to this testimony, and upon the court overruling the objection an exception was taken.

Continuing, the witness testified as follows, over this same objection of the defendant:

"Q. And you have not, about the times, the days or weeks, any distinct recollection?

A. I can say I am certain it was 12 or 14 days after I took the measurements that I noticed the change."

IX. The court erred in excluding the following evidence of W. W. Sherwood, a witness for the defendant, which appears on his re-examination as follows:

"Q. I will ask you this hypothetical question: Suppose Mr.

McDade was sitting on the side of the car, and was sitting
255 on the north side facing north, throwing his body in the position in which I am, sitting facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout would you say from your familiarity with people being knocked off of trains and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank where the spout hit him, that he could have been knocked off by the spout?"

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question with the element in the hypothetical question that the train was going 25 miles an hour. This request was refused and defendant excepted.

X. The court erred in admitting, over the objection of the defendant, the following evidence found in the cross-examination of G. P. Poole, a witness for the defendant:

1st. "Q. Was the change made under your supervision?

A. Yes, sir.

Q. When was that change made?

A. It was somewhere from the 5th to the 20th of September, probably a little later.

Q. The 5th to the 20th of September, 1900?

A. Yes, sir.

Q. You can't get it nearer than that?

A. I can't from memory. I can say, however, after the 5th, because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions were objected to, and, upon the said objection being overruled, the defendant excepted.

2d. "Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

A. I gave a letter; I wrote a letter to all the foremen.

Judge HAMMOND: Did you give him any specifications to work by?

A. Just a letter; nothing else, only what I have stated.

Q. Do you know of your own personal knowledge that these changes, if any, were made?

A. Just what the men reported to me.

Q. Weren't you there last night?

A. Yes, sir.

Q. Do you know whether they were made or not?

256 A. I know there is a mark there; it looks to me like it had been raised."

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at the measurements that existed on the 18th of August, except by comparison,

I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the objection defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look and say a few moments ago that the bar had been elevated?

A. Yes, sir, to the best of my judgment three inches.

Q. The cross-bar, that is the one upon which the pulleys hang and over which the chains run and connect with the pipe?

A. Yes, sir.

Q. To the best of your knowledge, that cross-bar has been elevated three inches, under the instructions given by you in September; it has been raised three inches?

A. I judge so.

Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout, how much, in other words, would that shorten the chains?

A. Well, it would be guesswork.

Q. Is it not a fact that that would shorten the chains twice the amount of the elevation of the bar?

A. Yes, it would seem so.

Q. That it would carry the point of the spout, the nozzle, back about six or seven inches?

A. Yes, sir, that is my idea.

Q. Or make it much shorter, which?

A. Carry it back; it would raise it certainly."

The objection of the defendant was overruled as to these questions and the defendant excepted.

XI. The court erred in charging the jury as follows: "But if you find from the evidence that his death was caused by collision with the overhanging water-spout, either by a blow sufficient of itself to kill him, or by being so dazed or disconcerted by a blow from the spout or the downhanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such
257 damage- as are given by the statute of Arkansas, which has been read in your hearing."

To this portion of his honor's charge exception was duly taken by the defendant.

XII. The court erred in charging the jury as follows: "I shall not delay your consideration of this case by reviewing any arguments of fact or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here has taken its responsibility, as once before in another case, to decide that it is negligence of itself for a

railroad to so construct such appliances as that we have before us that they will injure the brakemen upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration of skill, except that of the foot-rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe for the brakemen on the trains is a conviction of negligence. Therefore, I submit the case to you upon the plain propositions above mentioned. I repeat:

1st. Was McDade killed by the collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

2d. Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident. If you find both of these propositions in favor of the plaintiffs, they should recover."

To which exception was taken at the time by the defendant.

XIII. The court erred in refusing the following special instruction, to wit: I. B. "The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin station; that is, it was obliged to use ordinary care to select such an appliance, and to so construct it, that it would not necessarily endanger its employés, whose duties required them to pass by it; but, as between the defendant and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general use; that is all that can be required of the defendant; so, in order that the plaintiff may
258 recover in this case, it is necessary for the plaintiff to convince you, by the preponderance of the evidence, that the construction and location of the water tank, or its appliances, were such as were not in general use throughout the country. So, if you believe from the evidence that the defendant did use ordinary care and prudence in the selection, arrangement and care of the water tank at Goodwin station, and that such a tank was one which, in the experience of the railroad business, was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and hence is the test of what is ordinary care."

XIV. The court erred in refusing the following special instruction requested by the defendant, which is as follows: "Where there are several methods in general use, it being a matter of judgment depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and

machinery which are in general use in the business; so if you believe from the evidence on some railroads the sway spouts of tanks were hung in a vertical position, and upon other well-regulated railroads the sway spouts upon water tanks were hung at an angle similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law and no matter whether the deceased was killed by coming into contact with the spout or not, there can be no recovery in this case."

XV. The court erred in refusing the third special instruction requested by the defendant, which is as follows: "The defendant did not undertake with McDade that it would use the very water tank and appliances, nor was the defendant called upon to discard the same, if it was reasonably suitable for his business, though there were other water tanks that were safer; if you believe from the evidence that this tank and its appliances were reasonably suitable for the business and reasonably safe, you should find for the defendant."

XVI. The court erred in refusing to give in charge defendant's special instruction No. IV, which is as follows: "If you believe
from the evidence that the sway spouts upon the various
259 well-regulated railroads of this country were hung at different
angles, and projected toward the track at different distances; and you likewise believe from the evidence that the method of hanging the sway spout at Goodwin was in common use by many of the well-regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use."

XVII. The court erred in refusing to give in charge defendant's special instruction No. V, which is as follows: "It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as with reasonable care upon the part of the servant can be used without danger to him except such danger as is incident to the business in which such instrumentalities are employed; so, also it is the duty of the master to provide a reasonably safe place in which the servant can perform his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such case the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his services without exposure to dangers that are not within the obvious scope of the employment as usually carried on. The master may, however, conduct the business in the way

that seems to him best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risks of the more hazardous method. Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew or should have known or foreseen, unless such risks are obvious, or the servant has actual knowledge or presumed knowledge of the danger. It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the services in which he engages; and it is likewise his duty to protect himself against known dangers and such dangers as can, by the use of ordinary care, be ascertained; and this duty is just as imperative upon him as that laid upon the master."

XVIII. The court erred in refusing to give the defendant's special instruction No. VI, in its original form, and likewise erred in modifying it. Said special instruction No. VI, in its original form was as follows:

"If you believe from the evidence that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law as above given you that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman and that he knew or by the exercise of ordinary care should have known of the danger incident to the construction and location of the sway spout, and that after he knew or by the exercise of ordinary care, should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk of whatever defects there were in the construction and location of the tank and its appliances, and there can be no recovery in this case."

The court gave this instruction to the jury with this addition and modification immediately following its conclusion, to wit: "But the given danger must have been one open to ordinary observation, and not one looking or hidden from the view."

XIX. The court erred in refusing to give in charge the 8th special instruction requested by the defendant, which is as follows:

"If you believe from the evidence that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars — the sway spout at Goodwin station, hung as it was hung prior to the death of McDade; and if you likewise believe from the evidence that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so."

XX. The court erred in refusing to give the ninth special instruction requested by the defendant, which is as follows:

"If you believe from the evidence that the deceased, McDade, had an equal opportunity with the defendant for observing the

sway spout and the manner in which it was hung at Goodwin station prior to his death, and that McDade had likewise an
261 equal opportunity of apprehending the dangers incident to passing underneath the sway spout upon freight cars, and with this knowledge continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection the court charges you that knowledge is either actual or presumed, that is, in the law, McDade is presumed to have had knowledge of those facts, which he should have known by the exercise of ordinary care."

XXI. The court erred in refusing to give the tenth special instruction requested by the defendant in its original form, and in giving it as modified. The tenth special instruction was as follows:

"If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company and that prior to his death he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the *Webster* division of the road, and a portion of which time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks on the Western division of the road as well as the tanks on the Eastern division of the road were constructed similar to the construction of the Goodwin tank; and that the sway spouts upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass *them*, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe from the evidence that he should have had this knowledge, and with this knowledge continued in the service of the defendant company, then he is presumed to have assumed the risks and there can be no recovery in this case. In this connection the court likewise charges you that you may take into consideration the frequency or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction by striking out the words, "similar to," and adding instead thereof the words, "precisely as found in." The court likewise interpolated after the words,
262 "determine," the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the Western division of the road, and a portion of which time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks on the Western division of the road as well as the tanks on the Eastern division of the road were constructed

precisely as found in the construction of the Goodwin tank, and that the sway spouts upon all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine from his observation or experience while engaged in the business of the company the dangers incident to passing underneath them upon freight cars."

XXII. The court erred in refusing to give the twelfth special instruction requested by the defendant, and which is as follows:

"If you believe from the evidence that the sway spout at Goodwin station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe from the evidence that neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII. The court erred in refusing to give defendant's 13th special request, which is as follows:

"The defendant is not liable for an injury sustained by its servant in the course of his employment when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence."

XXIV. The court erred in refusing to give the 16th special instruction requested by the defendant, which is as follows: "The defendant, in the erection, construction and location of the Goodwin tank was only required to use reasonable care to furnish a safe tank that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants
263 who, as they passed under the tank, were in the exercise of ordinary care upon their part; so, if you believe from the evidence that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting, or standing on the car, then you should find for the defendant."

XXV. The court erred in refusing to give in charge the 17th special instruction requested by the defendant, which is as follows:

"If you believe from the evidence that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him and he was thereby injured, then he is guilty of contributory negligence and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI. The court erred in refusing to give in charge the 18th special instruction requested by the defendant, which is as follows:

"If you believe from the evidence that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which was perfectly safe and one of which was subject to danger or risk, he voluntarily chose the latter

and was injured, he was guilty of contributory negligence and cannot recover."

XXVII. The court erred in refusing the 19th special instruction requested by the defendant, which is as follows:

"While the evidence shows that on ordinary occasions it is customary for brakemen to sit upon the side of the car, you are to say from the evidence whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question you should take into consideration all of the facts of the case. If you believe from the evidence that the engine whistled for Goodwin tank; that McDade had been over the road many times before, and had passed Goodwin tank; that he had an opportunity to observe the dangers and risks incident to the way in which the spout was hanging, and, if you likewise believe that an ordinarily prudent man situated as McDade was situated would have observed such risks and dangers and you likewise believe that an ordinar-ly prudent man from his familiarity with the road and the signals given should have known and recollected that he was passing the Goodwin tank, and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position with perfect safety and, in fact, from all the facts and circumstances in this case, if you believe that
264 an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company *as* guilty of negligence."

XXVIII. The court erred in refusing the 20th special instruction requested by the defendant, which is as follows:

"If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the defendant, that he was a man of mature years and capable of observing whether or not a sway-pipe spout was dangerous or not, and you further believe that whatever dangers were incident to the use of the Goodwin tank and its appliances were just as open and obvious to McDade as they were to the defendant company, then there was no duty incumbent upon the defendant company to warn McDade with regard to the dangers."

XXIX. The court erred in refusing to grant a motion for a new trial.

XXX. The court erred in refusing to grant a motion in arrest of judgment.

E. E. WRIGHT,
Att'y for Choctaw, Oklahoma & Gulf Railroad Co.

Petition for Writ of Error.

Filed April 21st, 1901. J. B. Clough, Clerk.

The defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered therein on the 6th day of February, A. D. 1901, comes now by E. E. Wright, its

attorney, and petitions the court for an order allowing said defendant to prosecute a writ of error to the honorable the United States circuit court of appeals for the sixth circuit under, and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security, which the defendant shall give and furnish upon said writ of error; and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the sixth circuit; and your petitioner will ever pray.

E. E. WRIGHT,
Attorney for the Choctaw, Oklahoma & Gulf Railroad Company.

265 In the Circuit Court of the United States, Western District of Tennessee, Western Division.

LAURA MCDADE ET AL.
vs.
CHOCTAW, OKLAHOMA & GULF R. R. CO. } No. —.

Supersedeas Bond.

Filed May 11, 1901.

Know all men by these presents, that we, The Choctaw, Oklahoma and Gulf R. R. Co., as principal, and E. E. Wright, and John Armstead, as sureties, are hereby held and firmly bound unto said —— —— in the full and just sum of six thousand dollars, lawful money of the United States, to be paid to the said Laura McDade, *et al.*, for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 25 day of February, A. D. 1901.

Whereas, the above-named principal has prosecuted a writ of error to the United States circuit court of appeals for the sixth judicial circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment rendered in the above-entitled suit against said principal by the circuit court of the United States for the western division of the western district of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

CHOCTAW, OKLAHOMA & GULF R. R. CO., [SEAL.]
By E. E. WRIGHT, *Att'y.* [SEAL.]
E. E. WRIGHT, *Surety.* [SEAL.]
JOHN ARMSTEAD, *Surety.*

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 19 day of May, 1901.

[SEAL.] JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court.
W. B. WEISIGER, *D. C.*

266 Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on, to wit, the 12th day of February, A. D. 1901, in the following cause, to wit:

LAURA MCDADE ET AL., Plaintiff-,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Defendant. } No. 3574.

Came again the parties to this suit by their respective attorneys when the said defendant, by its attorney, moves the court for a new trial of this case, which motion for satisfactory reasons to the court appearing is hereby refused, and a new trial of this case is hereby denied. Thereupon the counsel for defendant upon its behalf moved the court in arrest of judgment, which likewise the court denied, and thereupon defendant excepted to the action of the court, in overruling its motion for new trial, and in arrest of judgment, and prayed an appeal to the U. S. circuit court of appeals of the sixth circuit, sitting at Cincinnati, Ohio, which appeal was granted upon the defendant's executing proper bond.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, } *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Tennessee, Greeting:

267 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Laura Louise Mc-

Dade, *et al.*, and The Choctaw, Oklahoma and Gulf Railroad Company, a manifest error hath happened, to the great damage of the said Choctaw, Oklahoma and Gulf Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the 25th day of May, next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court the 20th day of May, A. D. 1901, and of the Independence of the United States of America, the 124 year.

[SEAL.] J. B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.

Allowed by:
HAMMOND,
United States District Judge.

I admit and certify that on this day there was filed in this case upon its removal to the circuit court of appeals at Cincinnati a copy of the writ of error in this case.

WATSON & FITZHUGH,
Att'ys for Def't in Error.

In the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio.

LAURA LOUISE MCDADE ET AL.
vs.
CHOCTAW, OKLAHOMA AND GULF R. R. CO. } No. 3574. Citation.

To Laura Lou-se McDade *et al.*, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the sixth judi-
268 cial circuit, at a session of said court to be held in the city of Cincinnati, in the State of Ohio, in said circuit, on the 25th day of May, A. D. 1901, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Tennessee, wherein *Laura Louise McDade et al.*, is plaintiff- in error and you are *defendant-* in error, to show cause, if any there be, why the judgment rendered against the

said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of May, A. D. 1901, and of the Independence of the United States the 124 year.

[SEAL.] E. S. HAMMOND,
U. S. District Judge for the Western District of Tennessee.

Executed by delivering a copy of this citation to us for plaintiff, Laura Louise McDade, this May 21, 1901.

WATSON & FITZHUGH,
Att'ys for Defendant in Error.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee.

I, John B. Clough, clerk of the circuit court of the United States for the western division of said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect and correct copies of the originals and the entire record and proceedings, including the original writ of error and citation in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

LAURA LOUISE MCDADE ET AL., by Their Next Friend,
vs.
CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY. } No. 3574.

In testimony whereof, I have hereunto written my name
269 and affixed the seal of said court at my office in the city of Memphis, Tennessee, this 24th day of May, A. D. 1901, and of the Independence of the United States the 124th year.

JOHN B. CLOUGH, *Clerk.*

Authentication.

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

No. 3574. Circuit court of the United States, western district of Tennessee. Laura L. McDade, *et al.*, by their next friend, *vs.* Choctaw, Oklahoma and Gulf Railroad Company.

270 And afterwards to wit on May 29th 1901, præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1901.

CHOCTAW, OKLAHOMA & GULF R. R. Co.
vs.
LAURA L. McDADE ET AL. } No. 982.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.

E. E. WRIGHT,
Att'y for Plaintiff in Error.

☞NOTE.—Must be signed by a member of the bar of Supreme Court of the United States or of any circuit court of the United States, and by individual (not firm) name.

271 And afterwards to wit on November 11th 1901, an agreement of counsel continuing the case was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
MRS. LAURA L. McDADE ET AL Defendants in Error. } # 982.

It is agreed by and between the attorneys for plaintiff in error and defendants in error, respectively, that the above-styled cause be continued until the December session of this honorable court.

This November 8th, 1901.

WRIGHT, PETERS & WRIGHT.
WATSON & FITZHUGH.

United States Circuit Court of Appeals for the Sixth Circuit.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
MRS. LAURA L. McDADE ET AL., Defendants in Error. } # 982.

In this cause it is agreed by and between the attorneys for the plaintiff in error and defendants in error, respectively, that the words "defendants' exceptions" on page 242 of the record should be, "bill of exceptions," and that this substitution may be considered as made.

272 It is further agreed by and between said attorneys that the following special instructions requested by the defendant railroad company, to wit: No. 1 (Record page 223), No. 6 (Record page 227), No. 7 (Record pages 227, 228), No. 10 (Record pages 228,

229), No. 11 (Record page 229), No. 14 (Record page 230), No. 15 (Record pages 230, 231), were given with such modifications as may be noted in the record, by the trial judge, in his general charge to the jury, and should be considered a part of said charge.

It is further agreed that the photograph of the tank on K. C. M. & B. R. R., Exhibit A to the evidence of R. H. Briggs, may be considered a part of the record and used on the hearing of this cause.

This 8th day of November, 1901.

WRIGHT, PETERS & WRIGHT.
WATSON & FITZHUGH.

And afterwards to wit on December 6th 1901, an entry was made upon the journal of said court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHOCTAW, OKLAHOMA & GULF R. R. Co. vs. MRS. LAURA LOUISE MCDADE. } Before Lurton & Wanty, JJ.

This cause is argued for plaintiff in error by Mr. E. E. Wright and for defendants in error by Mr. G. T. Fitzhugh and is submitted.

273 And afterwards to wit, on January 7th 1902 a judgment was rendered in said cause which reads and is as follows:

Judgment.

274 United States Circuit Court of Appeals for the Sixth Circuit.

CHOCTAW, OKLAHOMA & GULF R. R. Co. vs. MRS. LAURA L. MCDADE ET AL. } No. 982.

Error to the circuit court of the United States for the western district of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause be and the same is hereby affirmed with costs.

275 And afterwards to wit on January 25th, 1902 an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

276 United States Circuit Court of Appeals, Sixth Circuit.

THE CHOCTAW, OKLAHOMA & GULF R. R. Co., Plaintiff in Error, *vs.* MRS. LAURA MCDADE, LUCY MCDADE, and Kinney McDade, Defendants in Error.	No. 982. Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted Dec. 6, 1901; decided Jan. 7, 1902.

Before Lurton, circuit judge, and Wanty, district judge.

This is an action by the widow and children of John I. McDade to recover damages for his negligent death while in the service of the plaintiff in error. There was a judgment for the plaintiffs and the defendant has sued out this writ of error.

The deceased was killed at or near Goodwin station, Arkansas, between twelve and one o'clock on the night of August 18, 1900.

He was, at the time, in the discharge of his duty as head brakeman on top of a furniture car, some eight or ten cars back of the engine, in a train consisting of twenty-seven freight cars.

The crew of the train consisted of the engineer, fireman, two brakemen and the conductor. The train was westbound.

On approaching Goodwin the engineer, when from a quarter to one-half mile east, blew for the station. The conductor, who was in the cupola of the caboose, gave, with his lantern, the signal to pass Goodwin without stopping. This signal was passed by the rear brakeman, then on a car about three cars ahead of the caboose, to the head brakeman, McDade, and by the latter was repeated
277 to the engineer, who answered with a short blast. The train in consequence did not check, but passed Goodwin at a speed of probably twenty miles an hour.

When the train reached Brinkley, nine miles west, McDade was missed. His lantern was found on top of the car where he had last been seen, still burning and seated in a place provided for it near the grab-irons on the north side and west end of the top of the car, and within reach of the place from which the "go-ahead signal" had been repeated by the deceased. McDade's body was subsequently found on the ground on the north side of the track 675 feet west of the water tank at Goodwin. The evidence tended to show that it was the duty of brakemen to be on top of trains as they were approaching and passing stations, and that it was the duty of the head brakeman to watch for signals from the rear brakeman and to repeat them to the engineer.

There was evidence tending to show that when McDade reported the "go-ahead" signal on approaching Goodwin, that he was seated on the top and right-hand side of a furniture car, somewhat higher than the average freight car, and that he signaled the engineer over

the right-hand side of the top of the train, by the proper movement of his lantern.

His distance back from the engine and the engineer's position in the cab, made it necessary that the signal should be repeated over the side of the car just as this was. The evidence also tended to show that McDade, in being where he was when he repeated this signal, was just where his duty required him to be, both for observing and giving signals.

There was, at Goodwin, on the north side of the track, a water tank with usual swinging spout for lowering and connecting with the tank of the engine. The contention of the defendants in error was that McDade was hit by this spout when passing the tank at Goodwin, and that he was rendered unconscious or dazed, and fell off the train at or near the point where his body was found 675 feet west of this tank spout. In support of this conclusion there was evidence tending to show that this spout did not hang vertically in reference to the tank when not in use, but that it was constructed so close to the track, and swung at such an angle toward the track, as to endanger the lives of employés upon the top of passing cars.

There was also evidence tending to show that there was no reason of necessity or convenience for so constructing or maintaining this spout, and that customarily they were so swung, or suspended,
278 as to clear all trains, and all persons whose duty required them to be on the roof of passing cars.

There was also evidence tending to show that the deceased had received a violent blow from some blunt object on the left side of his head and face, and that this would be the side exposed to a collision with this spout if he remained in the position he was in when he was observed to give the go-ahead signal just before passing this spout. There was also evidence of injuries to other parts of his head and body likely to have resulted from a fall from the top of a train rapidly moving.

There was evidence tending to show that the car from which McDade fell was a furniture car and that it was both higher and wider than the average freight car. There was also evidence that such cars were frequently received into the trains of the plaintiff in error and of other companies.

McDade was an experienced brakeman, though he had been in the service of the plaintiff in error but a short time, and had not been over the division including Goodwin more than eight or ten times, equally divided between day and night trips.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The whole case of the plaintiff below was founded upon the theory that the deceased had been killed by coming into collision with an overhanging water-spout at the Goodwin tank.

The case was put to the jury by the trial judge alone upon this theory, for the jury were told that "if he was not struck by the water-spout or the chain depending from it in such a way as to cause

his fall from the car, your verdict should be for the defendant company."

While it cannot be said the evidence demonstrates that the deceased was caused to fall from his post by reason of a collision with the water-spout at Goodwin, yet the facts and circumstances pointing to that conclusion were quite sufficient to justify a verdict based upon such an assumption. We have reached this conclusion from an attentive examination of the evidence, and are content to state this result without burdening this opinion with the details, or an argument based on facts of interest only to the particular litigants here concerned.

So far as the motion for an instruction to find for the plaintiff in error was based upon the supposed insufficiency of the evidence in respect to the operativeness of the water-spout as a proximate factor in causing the death of the deceased, it was rightly denied.

279 2. In respect to the question of the negligence of the railroad company the court instructed the jury in regard to the maintenance of a water-spout in such a situation as to be liable to strike brakemen in the discharge of their duty, that "it is negligence of itself for a railroad to so construct such appliances as that we have before us that they will injure the brakemen at work upon its trains."

This was excepted to and has been assigned as error. Many requests for charges involving the duty of the employer to the employé in respect to safety of appliances and places for work were also refused, not because they were not law in the abstract, but because inconsistent with the instruction in respect to the peculiar case which had been already given. If, upon all the facts and circumstances in evidence, the jury could not reasonably have come to any other conclusion but that it was negligent to maintain a water-spout in such proximity to the track as to endanger employés whose duty required them to be on top of passing trains, the court was justified in the peremptory instruction given, and it was not error to either give the instruction we have set out or to refuse those which dealt with the question in the abstract.

Railroading is an occupation essentially dangerous, and the general principle is, that railroad employés undertake all the risks of the employment which are usually incident to the occupation.

But such employés do not assume the risk of the negligence of the company itself. Among the duties which devolve upon the company is that of exercising ordinary care in furnishing its employés with proper road-bed, track and other structures and appliances upon which and with which the service required may be rendered.

In the discharge of this general duty the master must not expose his servants when in the performance of their duty to perils or hazards against which they may be guarded by the exercise of ordinary care and diligence upon the part of the master. These principles are so well settled as to only need statement. Union Pacific Railroad *v.* O'Brien, 161 U. S. 451; Hough *v.* Railway Co., 100 U. S. 213; Reed *v.* Stockmeyer, 20 C. C. A. 383; Clow & Sons *v.* Boltz,

34 C. C. A. 550; Felton *v.* Bullard, 37 C. C. A. 1; Mason & O. R'd Co. *v.* Yockey, 43 C. C. A. 228.

In Reed *v.* Stockmeyer, cited above, the seventh circuit court of appeals, speaking by Circuit Judge Jenkins, said:

"So also, it is the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to
280 keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on."

The conclusive evidence was that such swinging spouts should be so constructed as to clear cars without endangering employés in the discharge of their duties on the roof of passing trains. To do this it was, perhaps, not always necessary or customary that the spouts should, when not pulled down, hang in a position absolutely vertical to the tank. But on all of the evidence it was made to appear most conclusively that they should not be placed in such close proximity to the track, or hang, when not in use, at such an angle as to endanger employés in the proper discharge of their duties on the top of passing trains.

It may be that the evidence was conflicting as to whether this particular spout was a peril to brakemen on top of cars of the usual height. But it was in evidence that cars built to carry furniture are somewhat higher above the track and somewhat wider than ordinary freight cars, and that such cars were well known in the traffic and frequently found in the trains on this railroad.

The evidence clearly established that neither necessity or convenience required that such spouts should be so constructed as to constitute a dangerous obstruction to employés on any cars known to the traffic. Judge Hammond, who tried the case in the circuit court, upon this subject summed up the law very tersely by saying to the jury, in justification of his instruction, that:

"It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence."

It was the duty of the company to use ordinary care to see that the dangers incident to the employment were not unnecessarily en-
281 larged and the servant thereby exposed to perils which could have been guarded against by the exercise of that degree of care due to employés. The unusual and unnecessary projection of buildings, posts, cattle-guards, etc., over a track, or so near as

to endanger employés in the discharge of their duties, has been generally regarded as negligence. Dorsey *v.* The Construction Company, 42 Wis. 583; Colf *v.* Chicago, etc., Rd. Co., 87 Wis. 273; Missouri Pac. R. Co. *v.* Somers, 78 Texas, 439; Geo. Pac. R. Co. *v.* Davis, 92 Ala. 300; Scanlon *v.* Boston A. R. Co., 147 Mass. 484; Chicago & Iowa Rd. Co. *v.* Russell, 91 Ill. 298; 5th edition Sherman & Redfield's Law of Negligence, section 201.

If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging water spouts in such proximity to passing cars as to endanger employés standing or sitting on the roof of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however, unnecessary such dangerous proximity might be.

But we are not called upon to decide such a question, for the conclusive evidence in this case was that neither necessity nor convenience required the maintenance of such spouts in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify an unnecessarily dangerous projection of the kind in question.

There was on the evidence in this case no error in instructing the jury, that if the deceased was struck by the tank spout at Goodwin while on the roof of a passing car, that the fact would convict the company of negligence.

3. So far as the motion to instruct the jury to find for the defendant was based upon the assumption of the risk incident to this spout by the deceased, or upon the evidence tending to show contributory negligence, the motion was properly denied.

McDade was entitled to rely upon the company's having properly constructed this spout, and the danger from the proximity of this particular spout was, by no means, so obvious, especially in view of McDade's short experience on this part of the road, as to charge him with having assumed the risk.

The questions of assumption of risk and of contributory negligence were properly left to the jury under a charge quite as favorable as the plaintiff in error could demand. Valley R'y Co. *v.* Keegan, 31 C. C. A. 255; Union Pac. R'y Co. *v.* O'Brien, 161 U. S. 451.

282 4. There was evidence admitted showing a reconstruction of this Goodwin water-spout after the accident. The plaintiff in error gave evidence of certain measurements of the appliance in question made after the accident; for the purpose of showing that it did not, at the time of the accident, constitute a peril to men on passing cars in the proper discharge of their duty, and also for the purpose of showing that in its construction it conformed to similar structures on the other roads.

For the purpose of showing that the structure was not in the same condition on the night of the accident as when these measurements were made the plaintiffs were permitted to show just what changes had occurred and their effect on subsequent measurements.

The evidence was, at the time, restricted to the single purpose of arriving at the condition of the structure at the time of the accident.

The jury at the time were warned to give this evidence of reconstruction no other effect. In the charge the court recurred to this evidence and said:

"I shall not comment on the proof, because it is not necessary. But as a precautionary warning it is best to repeat what was said by the court so often during the progress of the trial, that you must not imply anything against the defendant company by reason of the fact that after this accident they made a reconstruction of these water-tank appliances. The court kept that fact out of the proof as long as possible. But in trying to decide the conflict of testimony about the measurements by feet and inches it became necessary to take notice of this change in order to understand the value of the proof as to measurements. The fact of the change has no other bearing on the issue of this case than that; and for the reason so often explained to you, you should give the fact no other force than that which is necessary for the explanation of the distances."

We think there was no error.

Many errors have been assigned upon the admission of evidence. None of them are well taken.

There was no error in the charge given or charges refused.

Judgment affirmed.

283 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record & proceedings in the case of Choctaw, Oklahoma & Gulf Railroad Co. *vs.* Mrs. Louise McDade, *et al.*, No. 982, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 27 day of February A. D. 1902.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

284 In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA & GULF RAILROAD Company
vs.
LAURA LOUISE MCDADE ET AL.

Supersedeas Bond. Filed Feb'y 19th, 1902.

Know all men by these presents, that we The Choctaw, Oklahoma & Gulf Railroad Company as principal, and John Armistead and E. E. Wright, as sureties, are hereby held and firmly bound unto said Laura Louise McDade, Lucy W. McDade and Kinnie McDade

in the full and just sum of $10,000.00, lawful money of the United States, to be paid to the said Laura Louise McDade, Lucy W. McDade and Kinnie McDade, for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals and dated at Memphis, Tennessee, this 18th day of February A. D. 1902.

Whereas, the above-named principal has prosecuted a writ of error in the Supreme Court of the United States, holden at Washington in the District of Columbia to reverse the judgment rendered by the United States circuit court of appeals for the sixth district of the United States.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal prosecute its said writ of error to effect, and answer all costs and damages if *he* fail to make *his* plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

CHOCTAW, OKLAHOMA & GULF R. R. CO.
E. E. WRIGHT, *Att'y.*
E. E. WRIGHT, *Surety.*
JOHN ARMISTEAD.

285 Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 19th day of February A. D. 1902.

[SEAL.] DAN. F. ELLIOTTE,
Deputy Clerk of the Western Division of the Western District of Tennessee.

Approved at Memphis, Tennessee on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

Approved February 24th 1902.

JOHN M. HARLAN,
Associate Justice Supreme Ct. U. S.

286 In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
MRS. LAURA LOUISE MCDADE, LUCY MCDADE, and KINNEY McDade, Defendants in Error.

Comes now the above-named plaintiff in error, The Choctaw, Oklahoma and Gulf Railroad Company, a corporation organized and existing under and by virtue of certain acts of the Congress of the United States, to wit:

"An act to authorize the purchasers of the property and franchises

of the Choctaw Coal & Railway Company to organize a corporation, and to confer upon the same all the powers, privileges and franchises vested in that company," approved August 24th, 1894, 28th U. S. Statutes at Large, page 502, and "An act to amend an act approved August 24th, 1894, entitled 'An act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation, and to confer upon the same all the powers, privileges and franchises vested in that company,'" approved April 24th, 1896, 29th U. S. Statutes at Large, page 98, and complains, that in the record and proceedings had in said cause, and in the rendition of the judgment in said cause in the United States circuit court of appeals for the sixth district of the United States at the January, 1902, term thereof, against the plaintiff in error, on the — day of January, 1902, manifest error hath happened to the great damage of said plaintiff in error, all of which will appear in more detail in the assignment of errors filed with this petition.

Wherefore, said plaintiff in error prays that a writ of error may be issued in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, shall be sent to the said Supreme Court, and that in the allowance of said writ of error an order may be made fixing the amount of bond for a supercedeas in said cause, and for such
287 other orders and process as may cause said errors to be corrected by the Supreme Court of the United States.

Your petitioner would further show that under the decisions of this honorable court, and especially in the cases of Northern Pacific Railroad Company *vs.* Amato, 144 U. S., 465, and Lau Ow Bew *vs.* United States, 144 U. S., 47, your petitioner is entitled to an appeal from the judgment of the United States circuit court of appeals for the sixth judicial district to the Supreme Court of the United States, because your petitioner is a corporation created by an act of Congress, and hence this is a suit arising under the laws of the United States, without reference to the citizenship of the parties, and because by section 6 of the act of Congress of March 3rd, 1891, 26 Statutes at Large, 826, this is not a case in which the decision of the United States circuit court of appeals is final, as the matter in controversy exceeds one thousand dollars besides costs.

And your petitioner will ever pray.

J. W. McCLOUD,
E. E. WRIGHT,
Solicitors for Plaintiff in Error.

288 In the United States Circuit Court of Appeals, Sixth District.

CHOCTAW, OKLAHOMA & GULF R. R. Co., Plaintiff in Error,
vs.
LAURA LOUISE MCDADE, LUCY WOULLAND MCDADE, KINNEY McDade, and Bettie C. McDade, Defendants in Error.

Assignment of Error.

I.

The court erred in dismissing the writ of error of petitioner in that it affirmed the action of the circuit court of the United States for the western district of Tennessee, in overruling the defendant's motion made at the close of the evidence in the circuit court for a peremptory instruction in its behalf.

II.

The court erred in affirming the action of the circuit court in admitting over the objection of the plaintiff in error the following evidence which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the defendant in error, to wit:

"Q. Mrs. McDade, what was your husband earning at the time? A. $70.00 a month.

Mr. WRIGHT: That is objected to unless she knows of her own knowledge.

Said objection was overruled by the court, to which ruling the defendant excepted.

A. Well, they sent me a check.

Q. Who did?

289 A. The Choctaw, Oklahoma & Gulf Railroad Company after he was dead. I have that at home. It says: This is for 12 days' work and that was for $37.75.

Q. They sent you a check for $37.75, which they said was for 12 days' work?

A. Yes, sir.

Q. Mr. WRIGHT: That is objected — on the ground that it does not show his earning capacity, but merely what he earned for 12 days."

III.

The court erred in sustaining the action of the circuit court in admitting over the objection of the plaintiff in error the following evidence in the direct and re-examination of C. A. Hollowell a witness for the plaintiff to wit:

"Q. Where was he standing to the best of your knowledge at the time he was giving this signal as the train was pulling into Goodwin?

A. From the position of his lamp and the signal, I should judge he was probably sitting on the edge of the car.

Q. He was sitting at the time you gave this signal?

A. I should judge this was his position at this time.

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

Q. How long had the tank been in the condition that it was in the night that this train passed by?

A. As far as I know, ever since I have passed there.

Q. State whether or not you had ever made any observation in regard to it personally?

A. Nothing, only to be careful to be out of the way of it.

290 Q. You had to be careful to keep out of the way of it, did you?

A. Yes sir.

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

Q. State what is the usual custom of the head brakeman on your road, and others, in regard to their position on the top of the car when passing stations?

A. Well, there is no special position at all. They use their own pleasure in regard to that.

Q. What custom, if any, exists in regard to their sitting on the side of the car?

A. That is the customary position always of a person riding on top.

Q. Then at the time that this train pulled into Goodwin Ark., on the night of August 19th, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

A. Well, I will answer that he was in the discharge of his duties.

Q. He was, at the last time you saw him, in the proper discharge of his duties?

A. Yes, on top of the train, looking after the train."

These questions and answers were objected to by the counsel for defendant, and the objection being overruled, the defendant excepted.

"Q. State what his character was with reference to his efficiency, carelessness or prudence?

A. He was always very careful in handling trains, doing work and anything of that kind."

291 To this question and answer defendant objected, which objection was overruled and defendant excepted.

"Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending, as the train was pul-ing through Goodwin.

A. I don't know any reason that would necessitate his being on the ladder at all at that time."

To this question and answer defendant objected, which objection was overruled and defendant excepted.

"Q. State whether or not, if he desired to get in such a position that is, to descend on the ladder for the purpose of looking at anything or making any investigation, what is customary with reference to carrying his lantern?

A. He would not have left his lantern there, if he had went down the ladder. He would have taken his lantern with him.

Q. His lantern was, as you have stated, in a position?

A. That he would naturally place it in after he had finished giving the signal.

Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab-iron?

A. It would be evidently when he leaned out to pass the signal to the engineer that he would hold the grab-iron with his left hand with his lantern in the right, after being in that position passing it from the side of the car making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

These questions and answers were objected to, and which objections being overruled, defendant excepted.

292 IV.

The court erred in sustaining and affirming the action of the circuit court in admitting over the objection of the plaintiff in error the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff, to wit:

"Q. Mr. Briggs, describe the relative positions as near as you can, of the water-spout with reference to a passing train.

A. Well, it should be cleared.

Q. How much should they clear?

A. I cannot tell you exactly; I have never located a tank myself. There is a regular standard that the road department conforms to. I know that they must absolutely clear it.

A. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

A. So that it will clear everything.

Q. What do you mean by everything?

A. Anything in the way of the car, or a person on top."

The defendants objected to the admission of these questions and answers, which objection was overruled by the court and the defendant excepted.

Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position when not in use, what would that show?

A. It would show that the weight struck this cross-piece too soon,

or that the chain is too long. I could give further information how this does happen.

Q. Do that.

A. Of-entimes the spouts get rammed up or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in mak-
293 ing the spouts in the shop they are not particular in getting the same size, so the band will go a little further and then won't go down so far, and if they won't go down so far, the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

All of which evidence was objected to, and upon the court overruling said objection defendant excepted.

"Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length, and the band around the spout is in proper condition. Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as two feet and 8 inches—in a length on nine feet—the spout being nine feet long—the slant two feet and 8 inches in that length. Please state whether that would conform to the present state of the art of the standard tanks and spouts?

A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled and the defendant duly excepted.

"Q. What is the cause of it being at this angle, so that it would not clear the car?

A. Different causes; one, the spout might have been damaged and they had to change it. If the ring of the spout is here and they get another spout with the ring here, that makes the chain too long, and it hangs over. They might put new chains on, but that seldom happens. But the main cause is the spout gets mashed.
294 The fireman will give the engineer the signal and the first thing he goes and smashes it, and they send another spout and the men are not particular enough about putting this band in the right place, and that will control the position in which the spout hangs."

This last answer was objected to by the defendant; the objection was overruled, and the defendant excepted.

V.

The court erred in sustaining the action of the circuit court in admitting the following evidence over the objection of the plaintiff in error, to wit:

Said evidence is found in the testimony of W. D. Kennedy.

Q. Now, from the way the lantern was moving at the time you saw him giving the signal, what was your best impression at that time as to his position on the car."

A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on the brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than it is standing."

Said question and answer were objected to by the defendant; the objection was overruled, and the defendant excepted.

VI.

The court erred in sustaining the action of the circuit court in admitting over the objection of the plaintiff in error the following evidence found in the direct testimony of Dr. F. D. Smythe, a witness for the plaintiff, to wit:

295 Q. Doctor, assuming that the man was sitting on the side of the edge of the car with his legs hanging over the side of the car, the car being between 13 and 14 feet high, and being a part of a train which was running at a rate of speed, say, between 20 and 26 miles an hour, that he was found on the side of the track, on which the train was moving, in the condition and with the injuries such as I have above described to you, please state whether or not, in your opinion, if you have an opinion of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on level ground?

Counsel for defendant objected to said question, which was overruled, and defendant excepted.

A. It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible.

Counsel for defendant objected to what is possible.

Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries which as I have described to you, could, or not, have been produced by falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all I can say. My opinion is that a single blow could not have produced such an injury as you have described.

Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature, or surface, as to receive impressions of footprints,
296 whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that?

To this question counsel for defendant excepted, the court overruled the same, and the defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate of speed and coming in contact with the ground, without some interruption from the fall. I can readily see how a very extensive injury could result, but I cannot see how it would produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it while the train was running 20 or 25 miles an hour, be such an instrument as would produce such injuries?

A. There comes the question again. I don't think a blow from the pipe would produce it all, but I am satisfied that a blow from the pipe would produce the injury to the jaw-bone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury to soft parts."

To this question and answer the defendant objected, and upon the court overruling the objection, duly excepted.

"Q. In your opinion, please state whether or not the condition and injuries described to you could or not have been produced by a combination of blows, viz., the blow from such a pipe, where the party's head comes in contact with it, when he is on a train running at 20 or 25 miles an hour, and is knocked from the car, after such blow is received, falling to the ground?

297 A. Yes sir, I think the combination of blows would account under the circumstances, for the condition the man was found in.

Q. In your opinion, neither the falling from the car nor the blow from the pipe under these circumstances alone could produce that combination of injuries?

A. Not alone, no, sir. I am not prepared to say what happened when he fell."

To this last question and answer defendant objected, which objection was overruled and defendant excepted.

VII.

The court erred in sustaining the action of the circuit court in admitting the following evidence over the objection of the plaintiff in error, found in the direct examination of Dr. Webb, a witness for the plaintiff, to wit:

"Q. Please state whether or not the injuries such as you have described, and in addition assuming that the jaw-bones were crushed, and that he had a large scalp wound on the left side of his head near the rear, whether such injuries could have been produced by a fall from a car 13 or 14 feet in height running at a rate of speed

of 20 to 25 miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground whether those injuries could have been produced by such a fall?

A. I don't hardly think it could.

A. Please state whether or not such injuries as you saw, and in addition thereto the injuries which I have just described to you could in your opinion, have been produced by the party coming in contact with an iron pipe about ten inches in diameter, the pipe striking him on the head, while in the position on the side of
298 the car, moving at from 20 to 25 miles an hour, and his falling thereafter to the ground.

A. Yes, I think it would, all right.

Q. But the mere fall under these circumstances, in your opinion, could not have produced those injuries?

A. I don't see how it could; it might have done it."

To all of this evidence of Dr. Webb, the defendant objected, and upon the objection being overruled by the court, the defendant excepted.

VIII.

The court erred in admitting over the objection of the plaintiff in error the following evidence found in the testimony of Frank Sayers, on cross-examination, to wit:

Q. Had this upright to which the pulleys are attached, and through which the chain passes, which connects with the water-spout, been elevated?

A. It had not been done at that time.

Q. How did you know it hadn't?

A. Because I noticed it after it was done.

Q. When was it done?

A. Eight or ten days after I made those measurements.

Q. Did you see it done?

Counsel for defendant here objected to any change being shown in the appliances connected with the spout after the accident occurred.

Judge HAMMOND: What day of the month did you make this measurement to which you have testified?

A. It was along about the 3d or 4th of September.

299 Judge HAMMOND: "This accident happened on the 18th of August?"

A. Yes sir.

Mr. FITZHUGH: Do you know the date when these changes were made?

A. No sir, I don't know the date, but, passing there the first time after it was made, I noticed the difference in the spout.

Judge HAMMOND: Did you make your measurements before you noticed the change?

A. Yes sir.

Counsel for defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

"Judge HAMMOND: At the time you made these measurements, did you notice any changes in this structure as you knew if before?

A. If there were any changes they were so slight I could not detect it.

Q. Was that the time 8 or 9 days after you took the measurements that you say you noticed the change?

A. No sir, I noticed it on the train in passing, but did not stop off.

Q. When was that?

A. I could not give it.

Q. How many days after you took the measurements before you went back?

A. It was probably two weeks, maybe more.

Q. Were you not there 8 or 9 days after you took the measurements at Goodwin, Ark., after this change—after you took these measurements?

A. I am not certain. I would be somewhere about that time.

Defendant again objected to this testimony, and upon the court overruling the objection, an exception was taken.

Continuing the witness testified as follows, over this same
300 objection of the defendant.

Q. And you have not, about the times, the days or weeks, any distinct recollection?

A. I can say I am certain it was 12 or 14 days after I took the measurements that I noticed the change.

IX.

The court erred in sustaining and affirming the action of the circuit court in admitting the following evidence of W. W. Sherwood, a witness for the plaintiff in error, which appears on his re-examination as follows:

Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car, and was sitting on the north side facing north, throwing his body in the position in which I am, sitting facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout would you say from your familiarity with people being knocked off of trains and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank where the spout hit him, that he could have been knocked off by the spout?

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question with the element in the hypothetical question that the train was going 25 miles an hour. This request was refused and defendant excepted.

301 X.

The court erred in sustaining the action of the circuit court in admitting over the objection of the plaintiff in error the following evidence found in the cross-examination of G. P. Poole, a witness for the defendant:

"Q. Was the change made under your supervision?
A. Yes, sir.
Q. When was that change made?
A. It was somewhere from the 5th to the 20th of September, probably a little later.
Q. The 5th to the 20th of September, 1900?
A. Yes, sir.
Q. You can't get it nearer than that?
A. I can't from memory. I can say, however, after the 5th because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions and answers were objected to, and, upon the said objection being overruled, the defendant excepted.

Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?
A. I gave a letter. I wrote a letter to all the foreman.
Judge HAMMOND: Did you give him any specifications to work by?
A. Just a letter; nothing else, only what I have stated.
Q. Do you know of your own personal knowledge that these changes, if any, were made?
A. Just what the men reported to me.
Q. Weren't you there last night?
A. Yes, sir.
Q. Do you know whether they were made or not?
302 A. I know there is a mark there; it looks to me like it had been raised.

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at all the measurements that existed on the 18th of August, except by comparison, I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the objection defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look and say a few moments ago that the bar had been elevated?

A. Yes sir, to the best of my judgment three inches.

Q. The cross-bar, that is the one upon which the pulleys hang and over which the chains run and connect with the pipe?

A. Yes sir.

Q. To the best of your knowledge, that cross-bar has been elevated three inches under the instructions given by you in September, it had been raised three inches?

A. I judge so.

Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout, how much, in other words, would that shorten the chains?

A. Well, it would be guesswork.

Q. Is it not a fact that that would shorten the chains twice the amount of the elevation of the bar?

A. Yes, it would seem so.

Q. That it would carry the point of the spout, the nozzle,
303 back about six or seven inches.

A. Yes, sir, that is my idea.

Q. Or make it much shorter, which?

A. Carry it back; it would raise it certainly."

The objection of the defendant was overruled as to these questions and the defendant excepted.

XI.

The court erred in sustaining the action of the circuit court and affirming same in charging the jury as follows:

"But if you find from the evidence that his death was caused by collision with the overhanging water-spout, either by a blow sufficient of itself to kill him, or by being so dazed or disconcerted by a blow from the spout or the downhanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damage as are given by the statute of Arkansas, which has been read in your hearing."

To this portion of his honor's charge exception was duly taken by the defendant.

XII.

The court erred in sustaining the action of the circuit court in charging the jury as follows:

"I shall not delay your consideration of this case by reviewing any arguments of fact or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed,
304 there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here has taken its responsibility, as once before in another case to decide that it is negligence of itself for a railroad to so construct such ap-

pliances as that we have before us that they will injure the brakeman upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe for the brakemen on the trains is a conviction of negligence. Therefore, I submit the case to you upon the plain proposition above mentioned. I repeat:

1st. Was McDade killed by the collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

2nd. Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident. If you find both of these propositions in favor of the plaintiffs, they should recover."

To which exception was taken at the time by the defendant.

XIII.

The court erred in sustaining the action of the circuit court in refusing to give the following special instructions of the plaintiff in error after the judge had delivered his general charge:

"The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction
305 of the water tank and its appliances at Goodwin station; that is, it was obliged to use ordinary care to select such an appliance, and to so construct it, that it would not necessarily endanger its employés, whose duties required them to pass by it; but, as between the defendant and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general use; that is all that can be required of the defendant; so, in order that the plaintiff may recover in this case, it is necessary for the plaintiff to convince you, by the preponderance of the evidence, that the construction and location of the water tank, or its appliances, were such as were not in general use throughout the country. So, if you believe from the evidence that the defendant did use ordinary care and prudence in the selection, arrangement and care of the water tank at Goodwin station, and that such a tank was one which, in the experience of the railroad business, was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use, under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and hence is the test of what is ordinary care."

XIV.

The court erred in sustaining the action of the circuit court in refusing the following special instructions requested by the plaintiff in error, after the circuit judge had given his general charge, which is as follows:

306 "Where there are several methods in general use, it being a matter of judgment depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and machinery which are in general use in the business; so if you believe from the evidence on some railroads the sway spouts of tanks were hung in a vertical position, and upon other well-regulated railroads the sway spouts upon water tanks were hung at an angle similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law, and no matter whether the deceased was killed by coming into contact with the spout or not, there can be no recovery in this case."

XV.

The court erred in sustaining the action of the circuit court in refusing the third special instruction requested by the plaintiff in error after the circuit judge had delivered his general charge and which is as follows:

"The defendant did not undertake with McDade that it would use the very best water tank and appliances, nor was the defendant called upon to discard the same, if it was reasonably suitable for his business, though there were other water tanks that were safer; if you believe from the evidence that this tank and its appliances were reasonably suitable for the business and reasonably safe, you should find for the defendant."

307 XVI.

The court erred in sustaining the action of the circuit court in refusing to give the fourth special instruction requested by the plaintiff in error, which is as follows:

"If you believe from the evidence that the sway spouts upon the various well-regulated railroads of this country were hung at different angles, and projected toward the track at different distances; and you likewise believe from the evidence that the method of hanging the sway spout at Goodwin was in common use by many of the well-regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use."

XVII.

The court erred in sustaining the action of the circuit court in refusing to give in charge the plaintiff in error's special instruction No. V, which is as follows:

"It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as with reasonable care upon the part of the servant can be used without danger to him except such danger as is incident to the business in which such instrumentalities are employed; so, also, it is the duty of the master to provide a reasonably safe place in which the servant can perform his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the
308 employment, the location of the premises and their surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such case the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his services without exposure to dangers that are not within the obvious scope of the employment as usually carried on. The master may, however, conduct the business in the way that seems to him best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risks of the more hazardous method. Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however assume unusual and extraordinary risks, of which the master knew or should have known or foreseen, unless such risks are obvious or the servant has actual knowledge or presumed knowledge of the danger. It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the services in which he engages; and it is likewise his duty to protect himself against known dangers and such dangers as can, by the use of ordinary care, be ascertained; and this duty is just as imperative upon him as that laid upon the master."

XVIII.

The court erred in sustaining the action of the circuit court in refusing to give the special instruction No. VI of plaintiff in error as requested in its original form, and likewise erred in sustaining the circuit court in its modification of the same. Said special
309 instruction No. VI in its original form was as follows:

"If you believe from the evidence that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law as above given you that the defendan was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman and that he knew

or by the exercise of ordinary care should have known of the danger incident to the construction and location of the sway spout, and that after he knew or by the exercise of ordinary care, should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk of whatever defects there were in the construction and location of the tank and its appliances, and there can be no recovery in this case."

The court gave this instruction to the jury with this addition and modification immediately following its conclusion, to wit: "But the given danger must have been one open to ordinary observation, and not one lurking or hidden from the view."

XIX.

The court erred in sustaining the action of the circuit court in refusing to give in charge the VIII special instruction requested by the plaintiff in error which is as follows:

"If you believe from the evidence that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars — the sway spout at Goodwin station, hung as it was prior to the death of McDade; and you likewise believe from the evidence that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do *do*."

310 XX.

The court erred in sustaining the action of the circuit court in refusing to give in charge the 9th special instruction requested by the plaintiff in error which is as follows:

"If you believe from the evidence that the deceased, McDade, had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin station prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to passing underneath the sway spout upon freight cars, and with this knowledge continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection the court charges you that knowledge is either actual or presumed, that is, in the law, McDade is presumed to have had knowledge of those facts, which he should have known by the exercise of ordinary care."

XXI.

The court erred in sustaining the action of the circuit court in refusing to give the 10th special instruction requested by the plaintiff in error in its original form, and in giving it as modified. The 10th special instruction is as follows:

"If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company and that prior to his death he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the Western division of the road, and a portion of which time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks on
311 the Western division of the road as well as the tanks on the Eastern division of the road were constructed similar to the construction of the Goodwin tank; and that the sway spouts upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe from the evidence that he should have had this knowledge, and with this knowledge continued in the service of the defendant company, then he is presumed to have assumed the risks and there can be no recovery in this case. In this connection the court likewise charges you that you may take into consideration the frequency or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction by striking out the words, "similar to," and adding instead thereof the words, "precisely as found in." The court likewise interpolated after the words, "determine," the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the Western division of the road, and a portion of which time he ran over what is known as the Eastern division of the road, and if you likewise find from the evidence that the tanks on the Western division of the road as well as the tanks on the Eastern division of the road were constructed precisely
312 as found in the construction of the Goodwin tank, and that the sway spouts upon all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine from his observation or experience while engaged in the business of the company the dangers incident to passing underneath them upon freight cars."

XXII.

The court erred in sustaining the action of the circuit court in refusing to give the 12th special instruction requested by the plaintiff in error, which is as follows:

"If you believe from the evidence that the sway spout at Goodwin station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe from the evidence that neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII.

The court erred in sustaining the action of the circuit court in refusing to give the special instruction No. 13 as requested by the plaintiff in error which is as follows:

"The defendant is not liable for an injury sustained by its servant in the course of his employment when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it
313 cannot be ascertained by either in the exercise of reasonable care and prudence."

XXIV.

The court erred in sustaining the action of the circuit court in refusing to give the 16th special instruction requested by the plaintiff in error, which is as follows:

"The defendant, in the erection, construction and location of the Goodwin tank was only required to use reasonable care to furnish a safe tank that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their part; so, if you believe from the evidence that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting, or standing on the car, then you should find for the defendant."

XXV.

The court erred in sustaining the action of the circuit court in refusing to give the 17th special instruction requested by the plaintiff in error, which is as follows:

"If you believe from the evidence that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him and he was thereby injured, then he is guilty of contributory negligence and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI.

314 The court erred in sustaining the action of the circuit court in refusing to give the 18th special instruction requested by the plaintiff in error, which is as follows:

"If you believe from the evidence that McDade, as he passed the

Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which was perfectly safe and one of which was subject to danger or risk, he voluntarily chose the latter and was injured, he was guilty of contributory negligence and cannot recover."

XXVII.

The court erred in sustaining the action of the circuit court in refusing to give the 19th special instruction requested by the plaintiff in error, which is as follows:

"While the evidence shows that on ordinary occasions it is customary for brakemen to sit upon the side of the car, you are to say from the evidence whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question you should take into consideration all of the facts of the case. If you believe from the evidence that the engine whistled for Goodwin tank; that McDade had been over the road many times before, and has passed Goodwin tank; that he had an opportunity to observe the dangers and risks, incident to the way in which the spout was hanging, and, if you likewise believe that an ordinarily prudent man situated as McDade was situated would have observed such risks and dangers and you likewise believe that an ordinarily prudent man from his familiarity with the road and the signals given
315 should have known and recollected that he was passing the Goodwin tank, and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position with perfect safety, and, in fact, from all the facts and circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence."

XXVIII.

The court erred in sustaining the action of the circuit court in refusing to give the 20th special instruction requested by the plaintiff in error, which is as follows:

"If you believe from the evidence that McDade was an experienced brakeman before he entered into the service of the defendant, that he was a man of mature years and capable of observing whether or not a sway-pipe spout was dangerous or not, and you further believe that whatever dangers were incident to the use of the Goodwin tank and its appliances were just as open and obvious to McDade as they were to the defendant company, then there was no duty incumbent upon the defendant company to warn McDade with regard to the dangers."

XXIX.

The court erred in refusing to grant a motion for a new trial.

XXX.

The court erred in refusing to grant a motion in arrest of judgment.

J. W. McCLOUD,
E. E. WRIGHT,
Att'ys for Choctaw, Oklahoma & Gulf R. R. Co., Plaintiff in Error.

316 UNITED STATES OF AMERICA, ss:

To Laura Louise McDade, Lucy W. McDade, and Kinney McDade, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and two.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

317 On this the 6th day of March, in the year of our Lord one thousand nine hundred and 2, personally appeared R. B. Fanning, deputy U. S. marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Laura Louise McDade, Lucy W. McDade and Kinney McDade.

Sworn to and subscribed the 7 day of March, A. D. 1902.

DAN. F. ELLIOTTE,
D. C., U. S. Circuit —, Western District of Tennessee.

Marshal's Fees.

1 serv	2.00
Exp	10
	$2.10

Acknowledgment of Service.

The said defendants Laura Louis- McDade, Lucy W. McDade, and Kinney McDade named in the within citation, hereby acknowl-

edges due and legal service of the same and that we have received a duly certified copy of the same from the clerk.

This the 6th day of March A. D. 1902.

LAURA LOUISE McDADE,
LUCY W. McDADE, AND
KENNEY McDADE,
By WATSON & FITZHUGH,
Their Attorneys.

318 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you, or some of you, between The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, and Laura Louise McDade, Lucy W. McDade and Kinney McDade, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of February, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

319 [Endorsed:] Filed Feb. 27 1902 Frank O. Loveland, clerk.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

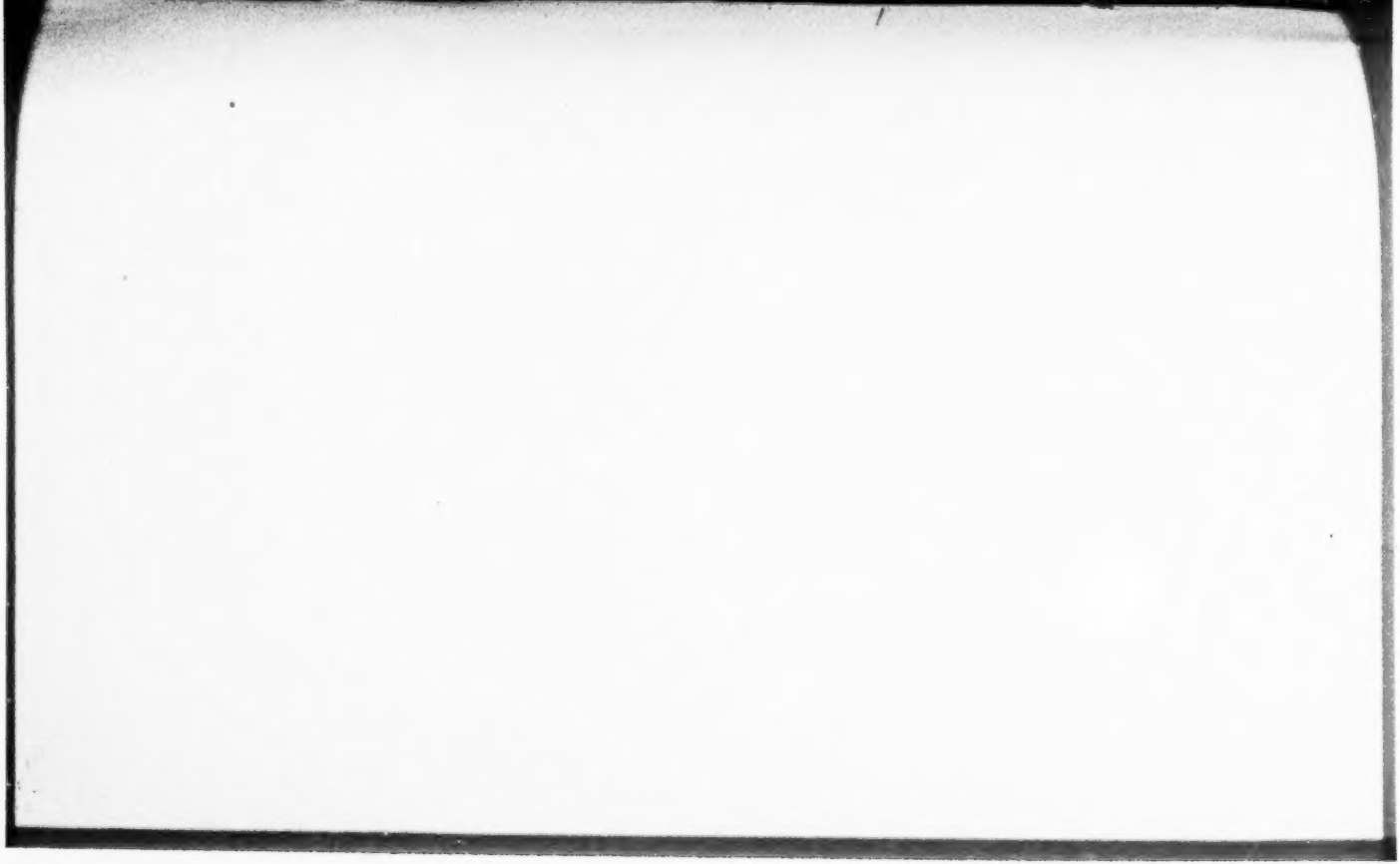
I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, have this day received and filed the foregoing writ, a copy of which is preserved on the files of said court; in obedience to the commands of said writ I transmit herewith an authenticated transcript of the record and proceedings in said court in the cause mentioned in said writ together with an assignment of errors, petition for the writ of error, citation, and copy of the bond on writ of error.

Done at Cincinnati, Ohio, this 27 day of February, 1902.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,471. U. S. C. C. of appeals, 6th circuit. Term No. 288. The Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, *vs.* Laura Louise McDade, Lucy W. McDade, and Kinney McDade. Filed April 1st, 1902.



SUPREME COURT OF THE UNITED STATES

October Term, 1908

CHOCTAW, OKLAHOMA & GULF R. R. CO.,
Plaintiff in Error,

vs. } No. 436.

LAURA LOUISE MEDARIS BRYAN,
Defendant in Error.

Brief for Plaintiff in Error.

J. W. McCLOUD,
GEO. S. PEYTON,
E. B. WHEELER,
C. M. BRYAN,
Attorneys.

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1903.

CHOCTAW, OKLAHOMA & GULF R. R. CO.,
Plaintiff in Error.

versus } No. 288.

LAURA LOUISE McDADE ET AL.,
Defendants in Error.

STATEMENT OF CASE.

This action was commenced in the Circuit Court of Shelby County, Tennessee, by the issuance of summons, and upon proper service obtained. Defendants in error filed their declaration therein. The plaintiff in error being a non-resident corporation, filed its petition for removal upon the grounds of diverse citizenship, which petition was granted, and the case removed to the United States Circuit Court for the Western Division of the Western District of Tennessee. (Record, pp. 2 to 8.)

The declaration, in so far as it need be set forth, avers that on or about the 19th day of August, 1900, John I. McDade, aged 27 years, was in the employ of the defendant, a steam commercial railroad company, as a brakeman on one of its freight trains; that about 1:30 o'clock a. m. on said day, while he was on top of one of the cars of defendant company, in the regular discharge of his duty as brakeman, and without any negligence on his part, the said Jno. I. McDade, at the time, when said freight train, drawn by one of the defendant's engines, was moving at a high rate of speed on, and over, the tracks of said railroad company, was violently struck and knocked off the said freight car by an iron spout suspended from one of defendant's water tanks; that this accident occurred near the town of Goodwin, in the State of Arkansas, and that John

McDade was so injured from such blow and fall that he died a few hours after the injuries occurred. Plaintiffs aver, that the death of the said John I. McDade was occasioned solely through the gross negligence of the defendant company in the following particulars, to wit: First, the failure to provide a safe and suitable place in which the deceased could discharge his duty. Second, in permitting the watersway spout to be and remain suspended so low over the track of the defendant as to endanger the life of its employe when in the discharge of his duties, which required him frequently to sit and stand upon the top of trains running under said spout. Third, that the defendant company was guilty of gross negligence in failing to provide the suitable chains, pulleys, etc., by which said spout could be hoisted back into an upright or perpendicular position, and so remain when not in use; and, in short, that the said defendant company failed to use ordinary care in the construction and maintenance of said spout, as well as in the inspection of the same. Fourth, in brief, plaintiff avers that the death of the said John I. McDade was proximately caused by the negligence of the defendant company, to which there was no contribution upon the part of the deceased. Fifth, plaintiffs aver that under the statute laws of the State of Arkansas they are entitled to recover $20,000 damages for the death of the said John I. McDade, so wrongfully killed by the defendant company, since they aver that they are the heirs-at-law and the designated beneficiaries under the statutes of Arkansas, which give them the right of recovery in this cause. (Record, pp. 3 and 4.)

After removal the railroad company entered two pleas. First, what is designated under the procedure of Tennessee as the general issue, broadly denying any actionable negligence upon the part of the defendant below. Second, for further plea in its behalf, the defendant averred that there was such contributory negligence upon the part of the deceased as would bar his beneficiaries from any recovery, even though the defendant, upon its part, had been guilty of negligence. (Record, p. 9.)

Upon the issues so made up the case was tried in the United States Circuit Court for the Western Division of the Western District of Tennessee, before Hon. E. S. Hammond, Circuit Judge, and a jury, where a verdict was rendered in favor of the plaintiffs below for $5,000 damages. (Record, p. 13.)

Motions for a new trial and in arrest of judgment were duly made by plaintiff in error, and were overruled by the presiding judge, whereupon exception was taken to the overruling of these motions, and the case carried to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati.

This court affirmed the judgment of the Circuit Court of Appeals on January 7, 1902.

Supersedeas bond was duly filed, and petition for writ of error prayed from the Supreme Court of the United States.

Said petition was duly granted, and the case brought by writ of error to this court.

The facts in the case, as shown by the evidence, are as follows: John I. McDade, for whose death this suit was brought, had been in the railroad business for some twelve or fifteen years prior to his death. He had occupied positions both as brakeman and conductor, and had served on several different railroads in these capacities; he was a thorough railroad brakeman and conductor, when, about the 24th of June, 1900, he entered the employ of the Choctaw, Oklahoma & Gulf Railroad Company as head brakeman. (Record, pp. 16 and 17.)

At the time of his death he was 27 years old, and left a wife, Mrs. Bettie C. McDade, and three girls, aged 1, 4 and 5 years, who, together with their mother, are the plaintiffs in this action. (Record, pp. 16 and 17.)

From the 24th of June, 1900, until August 19, the day upon which McDade was killed, he regularly ran upon the freight trains of the Choctaw, Oklahoma & Gulf Railroad Company, daily performing the duties of head brakeman. He had been performing these duties upon the Memphis division of the defendant railroad, which extends from Memphis, its eastern terminus, westward to Little Rock, for about six weeks prior to his death; and prior to the time that the said McDade ran upon the Memphis division he had run as brakeman on the western division of the railroad, which extended west from Little Rock. (Record, pp, 15, 38, 82, 114 to 117.)

On the night of August 18, 1900, the said John I. McDade left Memphis attached as brakeman to the train crew having charge of a freight train owned and operated by defendant company, which train was a local freight train, No. 9, and ran from Memphis, the eastern terminus of the said road, west to Little Rock, Arkansas, one of its

intermediate stations, a distance of about 130 miles. (Record, pp. 38, 39, 41, 42, 82, 83, 97 and 98.)

This train consisted of an engine and twenty-seven freight cars, and left Hopefield, the transfer station at Memphis, at 9:30 p. m., arriving at Little Rock the next day at 11:25 a. m. McDade performed his duties as head brakeman upon this train as it proceeded westward, and was last seen alive as the train left Forrest City, Ark., about 12:10 a. m. At that time the conductor of the train, C. A. Hollowell by name, held a conversation with him. (Record, p. 38.)

The train then proceeded westward, and as the train approached Goodwin Station, several miles west of Forrest City, and about 1:20 a. m., both the conductor and rear brakeman, as well as the engineer attached to train No. 9, saw a lamp signal given from the position that McDade occupied upon the train. (Record, pp. 40, 41, 82, 83, 84 and 149.)

When McDade gave this signal he was either standing or sitting upon one of the freight cars, about ten cars from the engine. (Record, pp. 40 and 83.)

This signal was given first by the conductor, who was in the caboose in the rear of the train, to the rear brakeman, W. D. Kennedy, who was several cars from the rear, and by him communicated to McDade, who was about ten cars from the engine, and by McDade communicated to the engineer, who was sitting in the engine cab. This signal was a go-ahead signal, and was given by merely raising lighted lanterns from the sides of the cars, and its meaning was an order from the conductor to the engineer to proceed through Goodwin Station without stoppage, and was communicated from the conductor to the engineer almost simultaneously. The signal was given by McDade when the train was a little more than one-half a mile east of Goodwin Station, and consisted in McDade's simply waving the lighted lantern from the side of the freight car upon which he is supposed to have been sitting. (Record, pp. 40, 41, 82 and 83.)

There is nothing in the record to show, except mere speculation, what was the position that McDade occupied upon the top of the car when he gave the last signal, as the train approached Goodwin; that is, there is nothing to show, except opinion, as to whether McDade was standing up or sitting down when this signal was given. (Record, pp. 41, 54, 55, 56, 83 and 86.)

At Goodwin Station was situated the water tank which the plaintiffs aver caused the death of the deceased. (Record, p. 23.)

Nothing more was seen of McDade, and his absence did not attract attention until the train reached Brinkley Station, nine miles west of Goodwin; there the train stopped, and the absence of McDade was noted. (Record, pp. 41, 42, 43 and 92.)

There search was instituted for McDade. The searching party consisted of the engineer, the conductor and the rear brakeman; they testified that they found his lantern on a furniture freight car, about ten cars from the engine; that it was placed in the grab iron on the side of the car, and end toward the engine, which grab iron is a part of the ladder of the car, the lantern being found on the right hand and north side of the train going west, and inside of the grab iron. The searchers, who had lighted torches, carefully examined the top and sides of this car, as well as the spaces between this car and the others to which it was joined, but found no evidences which would indicate the previous presence there of McDade; in short, there was no disturbance upon the car either of the dust or cinders that had accumulated thereon; neither were there any blood stains or any other marks of violence. (Record, pp. 41, 47, 92, 155, 156 and 157.)

The grab iron within which the lantern was found was about twelve inches from the edge of the car, and it was customary for brakemen, when sitting down upon the side of the cars, to have their lanterns by their sides. (Record, pp. 50 and 92.)

This lantern was burning when found. (Record, p. 92.)

After thorough search was made for McDade and a failure upon the part of the trainmen to find him, the trains following the train in question were telegraphed instructions to keep a lookout for McDade along the roadway with their headlights. When McDade was missed at Brinkley the trainmen knew that there was a passenger train following them closely, and consequently could not go back to look for McDade. This passenger train, No. 2, was communicated with, and, by virtue of its electric headlight, the body of McDade was discovered 675 feet west of the Goodwin tank, lying between the main track, upon which No. 9 ran, and a spur which jutted off at Goodwin Station. (Record, pp. 58, 59, 145, 146 and 147.)

He was found at 3:34 a. m., lying on his right side, with

his head doubled underneath and his body full of blood. He was facing the west, his back toward the east. There is a spur track which juts off from the main track at Goodwin tank and runs around the north side of the main track to a point some distance west of the point where McDade was found, and he was lying between this spur track and the main track. All trains, including the one that found McDade and the one to which he was attached, ran upon the main track during the night of the accident, and none of them ran upon this spur. The distance between the main track and the spur at the point where the body was found was about eight or nine feet, and McDade was found between the two tracks with his feet over near the ties of the main track, within two feet of the rail, while his head was about three feet from the crossties of the side track. (Record, pp. 146 and 147.)

The portion of the track at or near the point where he was found was level, hard and dry, as there had been no rain for a long time. His feet were about six inches from the crossties of the main track, and his head was doubled underneath his body. After he was found he breathed only once or twice, and died whilst being placed in the car. (Record, p. 146.)

The marks of violence found upon him were as follows: There was a wound upon the side of his head, whether the left or right side the record does not disclose positively, as the witnesses differ upon this fact. His ear was split and lip cut open, and some of his teeth were out, and he had a little scalp wound on his head, and one of his fingers broken. He likewise had a blow on the side of his head, and a blow on the front of his head, and a break on the hand. (Record, pp. 16, 17, 18 and 19.)

Prior to the date of the accident, McDade had been working about six weeks on the Memphis division of the Choctaw, Oklahoma & Gulf Railroad Company, upon which division he was working when killed; and had traveled over the entire road between Memphis and Little Rock many times during that period. In the discharge of his duties he had passed Goodwin Station both in the day time and in the night time. Each time he had passed over the railroad between Memphis and Little Rock, which is estimated at about ten round trips, before the date of the accident, and during this time this tank at Goodwin, with its spout and all appurtenances, had been in exactly the same condition that it was in at the time of the accident. (Record, pp. 38, 40 and 82.)

The car upon which his lantern was found was No. 28,149, Illinois Central Railroad furniture car, and had been delivered to the defendant railroad in the usual interchange of business. (Record, pp. 57 and 58.)

This furniture car was in build like an ordinary freight car, but was larger in every way than the usual box car, and was built larger because of the great amount of space that furniture occupies. Such cars were frequently handled by the defendant railroad company for some time prior to the date of the employment by it of McDade, and were frequently handled by the said railroad during the time that McDade worked upon that portion of the road which passed by Goodwin Station. (Record, pp. 41, 57, 58, 111, 112 and 114.) Prior to the time McDade had been running as brakeman over the Memphis division, he had been running as such over what is designated as the Booneville division of the Choctaw, Oklahoma & Gulf Railroad Company, which division extends westward from Little Rock; and, in the usual performance of his duties, he was obliged to pass and repass daily under the spouts of several different water tanks, which spouts were hung at the same angle as that of the Goodwin tank, and which tanks, with all their appurtenances, were exactly similar in construction, measurements and maintenance as the Goodwin tank, so that it may be taken as an undisputed fact that McDade had full and ample opportunity to ascertain the position of the Goodwin tank, and the situation of its spout, with regard to its distance from him, while performing his duties and occupying the various customary positions of a brakeman; and, since it is admitted that he was an experienced railroad man, the inference is clear that he was familiar with the dangers incident to passing under said spout while riding on freight cars. (Record, pp. 38, 48, 51, 54, 91, 92, 123 and 149.)

It is likewise proven that it is the duty of one occupying McDade's position to keep a careful lookout for all structures situated near to and projecting toward the track. (Record, p. 51.)

It is also uncontradicted that McDade was frequently attached to trains of the defendant company in which were situated furniture cars of like measurements as car No. 28,149, and while working as brakeman on said trains had passed the Goodwin tank many times prior to the date of the accident, both in the daylight and in the night time. (Record, pp. 111, 114 to 116.)

The tank at Goodwin Station was situated immediately westward of the depot, on the right hand, or north side, of the main track. (Record, p. 21.)

The tank consisted of the platform, supported by heavy timbers, upon which was placed a large water tank; to that part of the platform fronting the railroad track there was attached two heavy upright pieces, parallel to the tank, and in front of it, with a cross-beam at the top. To this cross-beam, and upon the underside, there were placed two fixed pulleys; through these pulleys ran two chains; to one end of each was attached a heavy iron weight; the other ends of these chains were attached to a large galvanized iron sway pipe, or spout; this spout was circular in shape, about 12 or 14 inches in diameter at the lower end and about 6 or 8 inches at the upper end. The lower end of the spout, which was the larger end, was not fixed or attached to anything when the tank was not in service; the upper end of the spout was in the shape of what is technically called a "goose neck;" that is, from the upper end of the spout, which was the smaller end, there was attached a curve or projection of like material as the rest of the spout, which extended directly toward the track almost at right angles. Underneath the platform, and running from the bottom of the tank proper, and below the platform, there was an iron supply pipe, which projected beyond the platform. To the underside of the sway pipe there were two small chains, and these chains were used by the firemen on the engines to pull the sway pipe down to such a position that its lower end would fit over the supply pipe, and thus allow the water from the tank proper to run through the supply pipe into the sway spout, and from thence into the engine. When not in use the lower end of the sway spout hung just above the mouth of the supply pipe, its nearer side to the tank being about on a line with the mouth of said supply pipe. Concerning the measurements of this tank and appurtenances so constructed, there was some difference in the testimony introduced by the plaintiff from that introduced by the defendant. The plaintiff introduced evidence showing the following measurements:

Distance from the neck of the supply pipe to the ground, 12 feet. Length of sway spout, 9 feet. Distance from a point upon the ground made by a line dropped perpendicularly from the neck of the supply pipe to the center of the nearest rail, 4 feet and 3 inches. Distance from a point on

the ground which was the termination of a line dropped perpendicularly from the extreme end of the goose neck, or the point upon the top of the spout which projected nearest to the rail, or center of the nearest rail, 4½ inches. Length of perpendicular line, 19 feet, from top of spout to the ground. Length of crook, or "goose neck," attached to the spout, 10 or 12 inches. The small chains attached to the spout, together with the ring, were 23 inches long. The angle of the slant of the spout was 3 feet in line. (Record, pp. 77, 78, 79, 80, 81.)

The defendant's evidence showed the length of a line dropped perpendicularly from the top, or nozzle, of the sway spout to the top of the track, 19 feet and 6 inches. The distance from a point upon the ground which was the termination of a line dropped from the mouth of the supply pipe perpendicularly to the center of the nearest rail, 4 feet 6½ inches. Distance from a point upon the ground which was the termination of a perpendicular line from the top, or nozzle, of the sway spout to the nearest rail, 6½ inches. The angle, or slant, of the sway spout is estimated at from 20 to 30 degrees—the difference between this angle and the angle contended for by the plaintiffs being accounted for by the fact that 10 or 12 inches of the sway spout extends directly toward the track at right angles, instead of obliquely; and the witness, Walker, who measured the slant for the plaintiffs, did not take into consideration this fact, because he measured the slant as about 3 feet in 9, whereas the goose neck extends at right angles with the track 10 inches. The other measurements agreed. (Record, pp. 127, 131, 166, 167.)

It is admitted that the furniture car was between 13 and 14 feet to the eaves thereof. It was 9 feet wide and 42 feet long; that the track was 4 feet 8½ inches wide, and that each rail was 2½ inches wide. (Record, pp. 101, 183, 170.)

It is likewise agreed that McDade was 6 feet 1 inch tall. It is also uncontradicted that, as the train to which McDade was attached passed Goodwin tank, the sway spout was in proper condition. It is likewise admitted that the night was clear, and that the electric headlight on the engine threw a light upon the water tank, fully disclosing it to any one on the cars for nearly a mile before the train reached the tank. (Record, pp. 17, 151, 156, 149.)

On the main issue, which it was necessary for the plaintiffs below to sustain, viz.: That the tank, together with its spout and other appurtenances, was not constructed or

maintained in proper condition, they only introduced one witness, R. H. Briggs, who testified that he was connected with the Kansas City system; that as such he was familiar with the construction of tanks, and that the sway spouts when at rest should hang absolutely vertical. (Record, p. 64.)

Over the objection of the defendant, this witness testified that when in proper position this sway spout should clear a car and a person thereon as it passed by; and he explained what he meant by this standard of proper construction by stating that this is the regular standard that the road department of the Kansas City system conforms to. (Record, pp. 65 and 66.)

On cross-examination he testified that he did not know how tanks were usually constructed on well regulated railroads throughout the United States, but that his experience and testimony was limited to the system that employed him. (Record, p. 70.)

On direct examination R. H. Briggs likewise testified that all of the sway spouts upon tanks situated on the Kansas City system hung perfectly vertical. In this he was contradicted; first, by his own testimony, for he admitted on cross-examination that there was one tank right in the city of Memphis the sway spout of which did not hang vertically; which tank belonged to the Kansas City system; second, the defendant introduced an engineer, who, at the time of the trial, was then in the employ of the Kansas City system, and who testified that he had just returned from a trip over the entire road, which trip he had taken to learn the road, and that every one of the water spouts upon the Kansas City system were swung at an angle and were not vertical, and that, moreover, upon the Kansas City system the sway spouts were hung just as the sway spout was hung upon the Goodwin tank prior to and at the time of the accident to John I. McDade—this witness having been familiar with the said tank at said time, as only recently he had left the services of the Choctaw, Oklahoma & Gulf Railroad Company to take service with the Kansas City system. (Record, pp. 119 and 120.)

The defendant below introduced upon this point the testimony of many expert railroad men who were familiar with the construction of tanks generally throughout the United States on well-regulated roads. They testified, first, that, of necessity, all sway spouts hung at an angle, because otherwise it would be most inconvenient, if not im-

possible, for the employes upon the engine to pull the sway spout down so as to put it in service by the small chains attached thereto; second, that the tank, with all of its appurtenances, at Goodwin Station, including the sway spout and the angle at which it was hung, was just such a structure as was generally used throughout the United States on well-regulated roads; third, that the construction of the Goodwin tank prior to and at the time of the accident was such that the sway spout would clear any one riding upon the top of a freight car, who was in the discharge of the ordinary duties of a brakeman. (Record, pp. 54, 91, 120, 131, 145, 146, 166.)

Over the objection of the defendant, the plaintiffs were allowed to prove that in the opinion of certain expert medical witnesses from a description of the injuries of McDade they were probably caused by two blows, and that, in their opinion, merely falling off the car upon the ground would not have caused the injuries sustained by him. However, one of these witnesses could not testify with any degree of certainty upon this point. Both of these witnesses likewise testified that these two blows might have been caused by the deceased falling on the sharp edge of the car and then to the ground, and that the injury upon the head undoubtedly caused the deceased to become immediately and continuously unconscious. (Record, pp. 104, 105, 108, 109, 119.)

The court also declined to allow W. W. Sherwood, a witness for the defendant below, who was familiar with the injuries sustained by persons falling off of a car, to state whether or not McDade, under the circumstances of this case, could have been knocked off by the spout. (Record, p. 148.)

At the close of the plaintiff's case the defendant requested a peremptory instruction in its behalf, which was refused by the court. Likewise, after the conclusion of the judge's charge, the defendant requested special instructions, which were either refused or modified, as shown in the bill of exceptions and assignments of error. (Record, pp. 205 and 206.)

A verdict for $5,000 was rendered in favor of the plaintiffs. Motions for a new trial and in arrest of judgment were overruled by the trial court, and the case carried to the United States Circuit Court of Appeals for the Sixth Circuit by a writ of error.

That tribunal affirmed the action of the lower court, and

a petition for writ of error was duly granted, and the case brought to this court.

Numerous exceptions were taken to the rulings of the trial judge upon the admission and exclusion of testimony, the plaintiff being allowed to show, by mere conjecture, the earning capacity of deceased and his behavior and conduct. Certain hypothetical questions were also objected to, as physicians were allowed to indulge in mere speculation, and railway employes were permitted to hazard opinions as to the causes of the accident.

Subsequent repairs to the tank and appliances, alleged to have caused the accident, were also shown over the objections of plaintiff in error. Many other portions of the evidence were also objected to, both as irrelevant and incompetent, as shown more particularly in the assignment of errors.

A peremptory instruction was asked by plaintiff in error, on the ground that negligence had not been fastened upon the railway company, and that the proof showed contributory negligence and assumption of risk by the deceased. This motion was overruled, and the case allowed to go to the jury.

Certain features in the charge of the judge upon the relative duties of the company and its servants were objected to and proper exceptions taken. Special supplementary charges were then asked by plaintiff in error. These charges embodied the theory of defendant, and set out the rules of contributory negligence, assumption of risk and the master's duty in language taken from recognized text books and authorities. All of them were refused by the trial court, and exceptions were taken by plaintiff in error.

At the conclusion of the case, and after the jury's verdict, motions were made to correct the errors assigned. All of these were overruled, and the case brought by way of the Circuit Court of Appeals to this honorable court.

A detailed statement of the errors complained of is found in the following:

ASSIGNMENTS OF ERROR.

I.

The court erred in dismissing the writ of error of petitioner in that it affirmed the action of the Circuit Court of the United States for the Western District of Tennessee, in

overruling the defendant's motion made at the close of the evidence in the Circuit Court for a peremptory instruction in its behalf.

II.

The court erred in affirming the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the defendant in error, to-wit:

"Q. Mrs. McDade, what was your husband earning at the time?

"A. Seventy dollars a month.

"Mr. Wright: That is objected to unless she knows of her own knowledge.

"Said objection was overruled by the court, to which ruling the defendant excepted.

"A. Well, they sent me a check.

"Q. Who did?

"A. The Choctaw, Oklahoma & Gulf Railroad Company, after he was dead. I have that at home. It says: 'This is for twelve days' work,' and that was for $37.75.

"Q. They sent you a check for $37.75, which they said was for twelve days' work?

"A. Yes, sir.

"Mr. Wright: That is objected to, on the ground that it does not show his earning capacity, but merely what he earned for twelve days."

III.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence in the direct and re-examination of C. A. Hollowell, a witness for the plaintiff, to-wit:

"Q. Where was he standing to the best of your knowledge at the time he was giving this signal as the train pulled into Goodwin?

"A. From the position of his lamp, and the signal, I should judge he was probably sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge this was his position at this time."

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

"How long had the tank been in the condition that it was on the night that this train passed by?

"A. As far as I know, ever since I have passed there.

"Q. State whether or not you had ever made any observation in regard to it personally.

"A. Nothing; only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it? Did you?

"A. Yes, sir."

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

"Q. State what is the usual custom of the head brakeman on your road, and others, in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19th, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes; on top of the train, looking after the train.

These questions and answers were objected to by the counsel for defendant, and, the objection being overruled, the defendant excepted.

"Q. State what his character was with reference to his efficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work and anything of that kind."

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

"Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending, as the train was pulling through Goodwin.

"A. I do not know any reason that would necessitate his being on the ladder at all at that time."

To this question and answer defendant objected; which objection was overruled, and defendant excepted.

"Q. State whether or not if he desired to get in such position; that is, to descend on the ladder for the purpose of looking at any thing, or making any investigation, what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position—

"A. That he would naturally place it in after he had finished giving the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north, or right hand, side of the grabiron?

"A. It would be, evidently, when he leaned out to pass the signal to the engineer that he would hold the grabiron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass the lantern to where his left hand was."

These questions and answers were objected to, and, which objection being overruled, the defendant excepted.

IV.

The court erred in sustaining and affirming the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff, to-wit:

"Q. Mr. Briggs, describe the relative position, as near as you can, of the water spout with reference to a passing train.

"A. Well, it should be cleared.

"Q. How much should be cleared?

"A. I cannot tell you exactly. I have never located a tank myself. There is a regular standard, and the road department conforms to it. I know that they must absolutely clear it.

"Q. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

"A. So that it will clear everything.

"Q. What do you mean by everything?

"A. Anything in the way of the car, or a person on top."

The defendant objected to the admission of these ques-

tions and answers, which objection was overruled by the court, and the defendant excepted.

"Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position; what would that show?

"A. It would show that the weight struck this cross-piece too soon, or that the chain is too long. I could give further information how this does happen.

"Q. Do that.

"A. Oftentimes the spouts get rammed up or smashed through the carelessness of the fireman in taking water, and they have to take the spout off and put another on, and the other spout is generally in the shop ready for an emergency of this kind, and, in making the spouts in the shop, they are not particular in getting the same size, so the band will go a little further and not go down so far, and if they don't go down so far the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

All of which evidence was objected to, and, upon the court overruling the objection, the defendant excepted.

"Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length and the band around the spout is in proper condition? Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as 2 feet and 8 inches—in a length of 9 feet—the slant 2 feet and 8 inches in that length. Please state whether that would conform to the present state of the art of the standard tanks and spouts.

"A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled, and the defendant duly excepted.

"Q. What is the cause of its being at this angle, so that it would not clear the car?

"A. Different causes. One, the spout might have been damaged, and they had to change it. If the ring of the spout is here and they get another spout with the ring here, that makes the chain too long, and it hangs over. They might put new chains on, but that seldom happens. But the main cause is, the spout gets mashed. The fireman will give the engineer the signal, and the first thing he goes and mashes it, and they get another spout, and the men are not

particular enough about putting this band in the right place, and it will control the position in which the spout hangs."

This last answer was objected to by the defendant; the objection was overruled, and the defendant excepted.

V.

The court erred in sustaining the action of the Circuit Court in admitting the following evidence, over the objection of the plaintiff in error, to-wit:

Said evidence is found in the testimony of W. D. Kennedy.

"Q. Now, from the way the lantern was moving, at the time you saw him giving the signal, what was your best impression at that time as to his position on the car?

"A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on a brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than standing."

Said question and answer objected to by the defendant; the objection was overruled, and the defendant excepted.

VI.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence found in the direct evidence of F. D. Smythe, a witness for the plaintiff, to-wit:

"Q. Doctor, assuming that the man was sitting on the side of the edge of the car, with his legs hanging over the side of the car, the car being between 13 or 14 feet high, and being a part of a train which was running at a rate of speed, say between twenty and twenty-six miles an hour, that he was found on the side of the track, on which the train was moving, in the condition, and with the injuries, such as I have above described to you. Please state whether or not, in your opinion, of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on the level ground?"

Counsel for the defendant objected to said question, which was overruled, and defendant excepted.

"A. That is a matter that I cannot give an answer to

with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible."

Counsel for defendant objected to what is possible.

"Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries which, as I have described to you, could, or could not, have been produced from falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

"A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all that I can say. My opinion is that a single blow could not have produced such an injury as you have described.

"Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature, or surface, as to receive impressions of footprints, whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that."

To this question counsel for the defendant objected; the court overruled the same, and defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate of speed and coming in contact with the ground, without some interruption from the fall. I could easily see how a very extensive injury could result, but I cannot see how it could produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

"Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it, while the train was running twenty or twenty-five miles an hour, be such an instrument as would produce such injuries?

"A. There comes the question again. I don't think a blow from the pipe would produce it all; but I am satisfied that a blow from the pipe would produce the injury to the jaw bone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury in soft parts."

To this question and answer the defendant objected, and, upon the court overruling the objection, the defendant excepted.

"Q. In your opinion, please state whether or not the condition and injuries described to you could or not have been produced by a combination of blows, viz.: The blow from such a pipe where the party's head comes in contact with it, when he is on a train running twenty or twenty-five miles an hour, and is knocked from the car, after such blow is received, falling to the ground?

"A. Yes, sir. I think the combination of blows would account, under the circumstances, for the condition the man was found in.

"Q. In your opinion, neither the falling from the car, nor the blow from the pipe, under these circumstances, alone could produce that combination of injuries?

"A. Not alone; no, sir. I am not prepared to say what happened when he fell."

To this last question and answer, defendant objected, which objection was overruled, and defendant excepted.

VII.

The court erred in sustaining the action of the Circuit Court in admitting the following evidence, over the objection of the plaintiff in error, found in the direct examination of Dr. Webb, a witness for the plaintiff, to wit:

"Q. Please state whether or not the injuries, such as you have described, and, in addition, assuming that the jawbones were crushed, and that he had a large scalp wound on the left side of his head, near the rear, whether such injuries could have been produced by a fall from a car thirteen or fourteen feet high, running at a rate of speed of twenty to twenty-five miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether these injuries could have been produced by such a fall?

"A. I don't hardly think it could.

"Q. Please state whether or not such injuries as you saw, and, in addition thereto, the injuries which I have just described to you, could have been produced by the party coming in contact with an iron pipe, about ten inches in diameter, and the pipe striking him on the head while in the position on the side of the car, moving at from twenty to twenty-five miles an hour, and his falling thereafter to the ground?

"A. Yes, I think it would, all right.

"Q. But the mere fall, under these circumstances, in your opinion, would not have produced those injuries?"

"A. I don't see how it could; it might have done it."

To all of this evidence the defendant objected, and upon the objection being overruled, the defendant excepted.

VIII.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, found in the testimony of Frank Sayres, on cross-examination:

"Q. Had this upright, to which the pulleys are attached, and through which the chain passes, which connects with the water spout, been elevated?

"A. It had not been at that time.

"Q. How do you know that it hadn't?

"A. Because I noticed it after it had been done.

"Q. When was it done?

"A. Eight or ten days after I made these measurements.

"Q. Did you see it done?"

Counsel for defendant here objected to any change being shown in the appliances connected with the waterspout after the accident occurred.

"Judge Hammond: What day of the month did you make this measurement, to which you have testified?

"A. It was about the 3rd or 4th of September.

"Judge Hammond: This accident happened on the 18th of August?

"A. Yes, sir.

"Mr. Fitzhugh: Do you know the date when these changes were made?

"A. No, sir, I don't know the date; but in passing there the first time after it was made, I noticed the difference in the spout.

"Judge Hammond: Did you make your measurements before you noticed the change?

"A. Yes, sir."

Counsel for the defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

"Judge Hammond: At the time you made these measurements, did you notice any change in this structure, as you knew it before?

"A. If there were any changes, they were so slight I could not detect it.

"Q. Was that the eight or ten days after you took the measurements, that you say you noticed the change?

"A. No, sir. I noticed it on the train in passing, but did not stop off.

"Q. When was that?

"A. I could not give it.

"Q. How many days after you took the measurements before you went back?

"A. It was probably two weeks; maybe more.

"Q. Were you not there eight or nine days after you took the measurements at Goodwin, Ark., after this change —after you took these measurements?

"A. I am not certain. It would be somewhere about that time."

Defendant again objected to this testimony, and, upon the court overruling the objection, an exception was taken.

Continuing, the witness testified as follows, over this same objection of the defendant:

"Q. And you have not, about the time, the days or weeks, any distinct recollection?

"A. I can say I am certain it was twelve or fourteen days after I took the measurements that I noticed the change."

IX.

The court erred in sustaining and affirming the action of the Circuit Court in excluding the following evidence of W. W. Sherwood, a witness for the plaintiff in error, which appears on his re-examination, as follows:

"Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car, and was sitting on the north side facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout, would you say, from your familiarity with people being knocked off of trains, and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank, where the spout hit him, that he could have been knocked off by the spout?"

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question, with the element of the hypothetical

question that the train was going twenty-five miles an hour. This request was refused, and defendant excepted.

X.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, found in the cross-examination of G. P. Poole, a witness for the defendant:

"Q. Was the change made under your supervision?

"A. Yes, sir.

"Q. When was that change made?

"A. It was somewhere from the 5th to the 20th of September; probably a little later.

"Q. The 5th to the 20th of September, 1900?

"A. Yes, sir.

"Q. You can't get it nearer than that?

"A. I can't, from memory. I can say, however, after the 5th, because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions and answers were objected to, and, upon the said objection being overruled, the defendant excepted.

"Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

"A. I gave a letter; I wrote a letter to all the foremen.

"Judge Hammond: Did you give any specifications to work by?

"A. Just a letter; nothing else, only what I have stated.

"Q. Do you know, of your own personal knowledge, that these changes, if any, were made?

"A. Just what the men reported to me.

"Q. Weren't you there last night?

"A. Yes, sir.

"Q. Do you know whether they were made or not?

"A. I know there is a mark there; it looks to me like it had been made."

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at all the measurements that existed on the 18th of August, except by comparison, I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the exception, defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look, and say a few moments ago that the bar had been elevated?

"A. Yes, sir; to the best of my judgment, three inches.

"Q. The cross-bar? That is, the one upon which the pulleys hang and over which the chains run and connect with the pipe?

"A. Yes, sir.

"Q. To the best of your knowledge, that cross-bar has been elevated three inches, under the instructions given by you in September; it had been raised three inches?

"A. I judge so.

"Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout; how much, in other words, would that shorten the chain?

"A. Well, it would be guess work.

"Q. Is it not a fact that that would shorten the chains twice the amount of the elevation of the bar?

"A. Yes; it would seem so.

"Q. That it would carry the point of the spout, the nozzle, back about six or seven inches?

"A. Yes, sir; that is my idea.

"Q. Or make it much shorter, which?

"A. Carry it back; it would raise it, certainly."

The objection of the defendant was overruled as to these questions, and the defendant excepted.

XI.

The court erred in sustaining the action of the Circuit Court, and affirming same in charging the jury, as follows:

"But if you find, from the evidence, that his death was caused by collision with the overhanging waterspout, either by a blow sufficient of itself to kill him, or by being so dazed and disconcerted by a blow from the spout or the overhanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas, which was been read in your hearing."

To this portion of his honor's charge exception was duly taken by the defendant.

XII.

The court erred in sustaining the action of the Circuit Court in charging the jury as follows:

"I shall not delay your consideration of this case by reviewing any arguments of fact or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here has taken its responsibility, as once before in another case, to decide that it is negligence of itself for a railroad to so construct such appliances as that we have before us, that they will injure the brakemen upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration of skill, except that of the foot-rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence. Therefore, I submit the case to you upon the plain proposition above mentioned. I repeat:

"First—Was McDade killed by the collision with the spout, or its chain, either directly, or by a fall, in consequence of a collision with either of them?

"Second. Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident? If you find both of these propositions in favor of the plaintiffs, they should recover."

To which exception was taken at the time by the defendant.

XIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the following special instructions of the plaintiff in error, after the judge had delivered his general charge:

"The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin Station; that is, it was obliged to use ordinary care to select such an appliance, and to so construct it that it would not necessarily endanger its employes, whose duties required them to pass by it; but, as between the defendant

and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general use; that is all that can be required of the defendant; so, in order that the plaintiff can recover in this case, it is necessary for the plaintiff to convince you by the preponderance of the evidence, that the construction and location of the water tank, or its appliances, were such as were not in general use throughout the country. So, if you believe, from the evidence, that the defendant did use ordinary care and prudence in the selection, arrangement and care of the water tank at Goodwin Station, and that such a tank was one which, in the experience of the railroad business, was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and, hence, is the test of what is ordinary care."

XIV.

The court erred in sustaining the action of the Circuit Court in refusng the following special instructions, requested by the plaintiff in error, after the circuit judge had given his general charge, which is as follows:

"Where there are several general methods in use, it being a matter of judgment, depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and machinery, which are in general use in the business; so, if you believe, from the evidence, on some railroads sway spouts of tanks were hung in a vertical position and upon other well-regulated railroads the sway spouts upon water tanks were hung at an angle, similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law, and, no matter whether the deceased was killed by coming into contact with the spout or not, there can be no recovery in this case."

XV.

The court erred in sustaining the action of the Circuit Court in refusing the third special instruction requested by the plaintiff in error, after the circuit judge had delivered his general charge, and which is as follows:

"The defendant did not undertake with McDade that it would use the very best water tank and appliances; nor was the defendant called upon to discard the same, if it was reasonably suitable for its business, though there were other water tanks that were safer. If you believe, from the evidence, that this tank and its appliances were reasonably suitable and reasonably safe, you should find for the defendant."

XVI.

The court erred in sustaining the action of the Circuit Court in refusing to give the fourth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the sway spouts upon the various well-regulated railroads of this country were hung at different angles, and projected towards the track at different distances, and you likewise believe, from the evidence, that the method of hanging the sway spout at Goodwin was in common use by many of the well-regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use."

XVII.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the plaintiff in error's special instruction number five, which is as follows:

"It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as, with reasonable care upon the part of the servant, can be used without danger to him, except such danger as is incident to the business in which such instrumentalities are employed; so, also, it is the duty of the master to provide a reasonably safe place in which the servant can perform his work, and to keep it in such suitable condition. The duty is not absolute, but relative. It is measured by the nature and char-

acter of the employment, the location of the premises and the surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such cases the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his services without exposure to dangers that are not within the obvious scope of the employment as usually carried on.

"The master may, however, conduct the business in the way that to him seems best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method.

"Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, unless such risks are obvious, or the servant has actual knowledge or presumed knowledge of the danger.

"It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the services in which he engages, and it is likewise his duty to protect himself against known dangers, and such dangers as can, by the use of ordinary care, be ascertained; and his duty is just as imperative upon him as that laid upon the master."

XVIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the special instruction number six of plaintiff in error, as requested in its original form, and likewise erred in sustaining the Circuit Court in its modification of the same. Said special instruction, in its orginal form, was as follows:

"If you believe, from the evidence, that the sway spout was hung at an improper angle, and too near the track, and you likewise believe, from the law as above given, that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew, or, by the exercise of ordinary care, should have known of the danger incident to

the construction and location of the sway spout, and that after he knew, or by the exercise of ordinary care should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk of whatever defects there were in the construction and location of the tank, and its appliances, and there can be no recovery in this case."

The court gave this instruction to the jury, with this addition and modification, immediately following the conclusion, to-wit:

"But the given danger must have been one open to ordinary observation, and not one lurking or hidden from the view."

XIX.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the eighth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars—the sway spout at Goodwin Station—hung as it was prior to the death of McDade; and you likewise believe, from the evidence, that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so."

XX.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the ninth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the deceased, McDade, had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin Station, prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to the passing underneath the sway spout upon freight cars, and, with this knowledge, continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection the court

charges you that knowledge is either actual or presumed; that is, in the law, McDade is presumed to have had knowledge of those facts, which he should have known by the exercise of ordinary care."

XXI.

The court erred in sustaining the action of the Circuit Court in refusing to give the tenth special instruction requested by the plaintiff in error, in its original form, and in giving it as modified. The tenth special instruction is as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that, prior to his death, he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of the road, as well as the tanks on the eastern division of the road, were constructed similar to the construction of the Goodwin tank; and that the sway spout upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe, from the evidence, that he should have had this knowledge, and, with this knowledge, continued in the service of the defendant company, then he is presumed to have assumed the risk, and there can be no recovery in this case. In this connection, the court likewise charges you that you may take into consideration the frequence or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction, by striking out the words "similar to," and adding, instead thereof, the words "precisely as found in." The court likewise interpolated, after the word "determine," the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as

modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road; and if you likewise find, from the evidence, that the tanks on the western division of the road, as well as the tanks on the eastern division of the road, were constructed *precisely as found in the* construction of the Goodwin tank, and that the sway spouts upon all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine, from his observation or experience while engaged in the business of the company, the dangers incident to passing underneath them upon freight cars."

XXII.

The court erred in sustaining the action of the Circuit Court in refusing to give the twelfth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the sway spout at Goodwin Station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe, from the evidence, that neither the defendant nor the deceased should, by the exercise of ordinary care, have known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the thirteenth special instruction, as requested by the plaintiff in error, which is as follows:

"The defendant is not liable for an injury sustained by its servant in the course of his employment, when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence."

XXIV.

The court erred in sustaining the action of the Circuit Court in refusing to give the sixteenth special instruction, requested by the plaintiff in error, which is as follows:

"The defendant, in the erection, construction and location of the Goodwin tank, was only required to use reasonable care to furnish a safe tank, that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their part; so, if you believe, from the evidence, that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting or standing on the car, then you should find for the defendant."

XXV.

The court erred in sustaining the action of the Circuit Court in refusing to give the seventeenth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him, and he was thereby injured, then he is guilty of contributory negligence, and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI.

The court erred in sustaining the action of the Circuit Court in refusing to give the eighteenth special instruction, requested by plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which was perfectly safe, and one of which was subject to danger or risk, he voluntarily chose the latter, and was injured, he was guilty of contributory negligence, and cannot recover."

XXVII.

The court erred in sustaining the action of the Circuit Court in refusing to give the nineteenth special instruction, requested by the plaintiff in error, which is as follows:

"While the evidence shows that, on ordinary occasions, it is customary for brakemen to sit upon the side of the

car, you are to say, from the evidence, whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question, you should take into consideration all of the facts in the case. If you believe, from the evidence, that the engine whistled for the Goodwin tank; that McDade had been over the road many times before, and had passed the Goodwin tank; that he had an opportunity to observe the dangers and risks incident to the way in which the spout was hanging; and you likewise believe that an ordinarily prudent man, situated as McDade was situated, would have observed such risks and dangers; and you likewise believe that an ordinarily prudent man, from his familiarity with the road and the signals given, should have known and recollected that he was passing the Goodwin tank; and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position with perfect safety; and, in fact, from all the circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence."

XXVIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the twentieth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the defendant; that he was a man of mature years, and capable of observing whether or not a sway pipe spout was dangerous; and you further believe that, whatever dangers were incident to the use of the Goodwin tank, and its appliances, were just as open and obvious to McDade as they were to the defendant company, then there was no duty incumbent upon the defendant company to warn McDade with regard to the dangers."

XXIX.

The court erred in refusing to grant a motion for a new trial.

XXX.

The court erred in refusing to grant a motion in arrest of judgment.

BRIEF OF THE ARGUMENT

OF PLAINTIFF IN ERROR.

I.

The court erred in overruling the defendant's motion, made at the close of the evidence, for a peremptory instruction in its behalf. It will be noted, on page 205 of the Record, that at the conclusion of the evidence in this case the defendant requested a peremptory instruction in its favor, which request was refused by the court, and to which the defendant then and there excepted. In the consideration of this assignment, it is necessary to review the evidence of this case in the light of two rules of practice, uniformly held by this honorable court, viz.:

First—That it is the duty of the trial judge to withdraw the case from the jury, and direct a verdict for the plaintiff or defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Railroad vs. Converse, 139 U. S., 469; Insurance Co. vs. Doster, 106 U. S., 32; Griggs vs. Houston, 104 U. S., 553; Randall vs. Railroad, 109 U. S., 478; Schofield vs. Railroad, 114 U. S., 615.

As is well expressed in Railroad vs. Bank, 123 U. S., 727: "Such a direction is eminently proper when it would be the duty of the court to set aside a different verdict, if it were rendered. It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."

Second—In personal injury cases, upon appeal, it is only where all reasonable men would agree that the evidence was insufficient to warrant a verdict, that the court is justified in withdrawing the case from the jury. Manufacturers' Co. vs. Ins. Co., 9 C. C. A., 12.

We submit, therefore, that all reasonable men would agree that the evidence in this case was insufficient to warrant the verdict rendered by the jury in the case at bar, and upon the following propositions:

First—That the plaintiffs' sole allegation of negligence was based upon the theory that the deceased had been

killed by a blow, from coming in contact with the sway spout, and, therefore, the burden of proof was cast upon the plaintiffs to sustain this allegation as a preliminary consideration, before considering the question of the negligence of the defendant in the construction and maintenance of such a sway spout.

Second—If the jury was justified in finding, from the evidence, that the deceased was killed by the sway spout, it became the duty of the jury to consider the following proposition, to sustain which the burden of proof was upon the plaintiffs, to wit: First, it was incumbent upon the plaintiffs to show, by a preponderance of the evidence, that the defendant failed to exercise ordinary care to provide its servant, the deceased, with safe and suitable instrumentalities to work with, or, more correctly speaking, a safe and suitable place in which to perform his duties, in that it negligently constructed and maintained its water tank and appliances at Goodwin Station. Second, if the jury was justified in finding that the defendant did negligently construct and maintain the sway spout at Goodwin Station, and thus failed to perform the duty that it owed to the deceased, it was still incumbent upon the plaintiffs, before there could be any recovery, to show, by a preponderance of the evidence, that the deceased had not assumed the risk of any danger arising from such negligence.

Third—If all of the foregoing questions were decided in favor of the plaintiffs, there still could be no recovery, and a verdict should have been directed by the court, if all reasonable men would agree that the deceased was guilty of contributory negligence, in which case, however, the burden of proof was cast upon the defendant.

We will discuss each of these questions in their regular order.

First, was there sufficient evidence to go to the jury upon the question as to whether or not the deceased was injured by the sway spout? It is admitted that there were no eye-witnesses to this accident. The last seen of McDade was the waving of his lamp, given from the train when the train was about a half mile west of Goodwin tank. (Record, pp. 37-81, 82, 83, 84, 149 and 150.)

When McDade gave this signal he was either standing or sitting upon one of the freight cars about ten cars from the the engine. (Record, pp. 40 and 82.)

Whether McDade was standing or sitting down when he gave this signal is left in doubt, as the two witnesses who

saw the signal state that they suppose he was sitting down, because it was a warm night, and it was more convenient for the deceased to sit down than to stand up. (Record, pp. 41 and 84.)

Likewise, one of the witnesses, Hollowell by name, testifies, on page 56 of the Record, that, with regard to his testimony concerning the position of McDade, it was mere speculation upon his part. (In support of this statement see pages 42, 44, 55, 56, 60, 70, 84, 86 and 101 of the Record.) Nothing more was seen of McDade, and his absence did not attract attention, until the train reached Brinkley Station, nine miles west of Goodwin. There the train stopped, and the absence of McDade was noted. (Record, pp. 41, 42, 43 and 92.)

The deceased was found 675 feet, by actual measurement, west of the Goodwin tank. (Record, pp. 58, 59, 145, 146 and 147.)

The testimony is in conflict as to whether or not McDade could have been struck by the sway spout sitting upon the side of the car, and, indeed, nothing can be determined from this evidence, since it largely depended upon the position, with regard even to inches, which he occupied. The proof shows that McDade had his chin crushed to the bone, his teeth knocked out, and on the side of his face his ear drum was bruised, which bruise was upon the left side. He likewise had a blow upon his chin, and a place on his forehead. There is other testimony to the effect that the jawbones on both sides were broken, that he had a slight wound on the left side of the head, near the rear, which did not amount to much.

See testimony of A. L. and R. S. Stephens, page 17; likewise the testimony of Mrs. McDade, page 16 of the Record.

These being the injuries proven, counsel for plaintiffs below assumed in the hypothetical question to Dr. Frank Smythe, pages 120 and 121, that he likewise had a blow upon the top of the head, but near the right side, and that there was a slight wound near the right side of the head near the rear, and, from the fact of these various wounds, asked him whether or not the injury could have been caused by merely falling from the car. The doctor first stated that he could not answer this question with any degree of certainty, but merely stated that his evidence would deal with possibilities. (Record, p. 104.)

Later, on page 105 of the Record, this same physician does state, in his opinion, these injuries could not have been produced by a single blow.

Dr. Webb, the only other medical expert introduced in this case, testified, on page 109 of the Record, that he only made a superficial examination of the deceased in his coffin, but from that he did not see how one blow could have produced the injury that he saw, but it might have done it. (Record, p. 110.)

This same physician, however, likewise admitted that a person might fall from the car and strike the side or edge of the car and then strike the ground, and thus cause the injuries the deceased sustained. (Record, p. 110.)

Dr. Smythe likewise testified on cross-examination, page 107, that the deceased must have become unconscious immediately upon being stricken, and have remained so until his death. He likewise states, on page 108, that he thinks the fractures could have been produced by falling from the height given, as there was a very tremendous force exerted by a man falling from the height he fell, but that the multiplicity of lesions led him to believe that there must have been more than one blow inflicted. This being all the evidence upon this point which even remotely had any bearing upon it, we submit, is not sufficient to justify any reasonable man in coming to the conclusion that the plaintiffs had sustained the burden of proof upon this proposition, irrespective of any evidence introduced by the defendant.

In the first place, is it possible that a man could be stricken a blow sufficient in force to render him immediately and profoundly unconscious and still retain his position upon the top of a car, with practically no support, which freight car was moving at about twenty-five miles an hour, until he, the deceased, had traveled a distance of 675 feet?

Again, if the spout had stricken him, would he not have been immediately knocked off of the car? This spout consisted of galvanized iron, was from 10 to 12 inches in diameter, and 9 feet long.

Again, if he had been stricken by the dangling chains with sufficient force to have dazed him, and then fell from the car, certainly he would not have held on a distance of 675 feet. Then, again, there were absolutely no evidences found upon the car which in any wise tended to show the fact that McDade had been struck by any object which projected toward the track. Nay, indeed, the searchers, who

held lighted torches, found nothing which would indicate the previous presence there of McDade, since there was no disturbance of either the dust or cinders which had accumulated thereon, nor were there any blood stains or other marks of that kind. (Record, pp. 47, 168, 155 and 156.)

It is likewise shown that the swinging motion of the car was great, and, indirectly, that brakemen frequently fall from moving cars.

Now, there was no necessity for McDade to have been in a position to have been struck, so far as the discharge of his duties were concerned. The position in which his lantern was found clearly showed that he had finished giving his signal and had performed all of the duties necessary to be performed in passing the Goodwin tank. And it is likewise admitted that the position on a car occupied by the brakeman was usually left to the brakeman's discretion, it being generally the duty of the brakeman to perform his duties in a careful, prudent manner, but the specific manner of the performance is left to his discretion. (Record, p. 46.)

It is likewise shown that it is the duty of the brakeman and all other employes to keep a careful lookout for projections toward the track, and it is likewise shown that McDade was an old, experienced railroad man, thoroughly familiar with the Goodwin tank, having passed there in the day and night many times prior to the night of the accident, and upon trains in which were located cars of similar height and structure to the one upon which he was standing or sitting when he fell from the car. (Record, pp. 45, 54.)

Without further discussion, we submit that, giving the plaintiff the benefit of every legitimate conclusion which could be drawn from this evidence, the most favorable aspect in which their case can be viewed is that it was possible that McDade was struck by the spout.

If, however, we go a step further and should agree, for the sake of argument, that it was equally as probable that McDade was struck by the spout, as it was that McDade was not struck by the spout, still there could be no recovery. Now, if McDade was standing up, he could not have been struck unless he had been standing upon the very edge of the car, which would have been impossible. Also, if McDade had been sitting with his head leaning toward the south, he would not have been struck; and, in short, there is only one position in which McDade could have been sitting and have been struck by the spout, viz.: Leaning over, with his head toward the tank. It will like-

wise be remembered that the lantern, which was found 10 or 12 inches south of the north edge of the car, was evidently placed by McDade's side, and shows that he was not sitting directly on the north edge of the car, but some little distance back.

In conclusion of argument upon this point, we summarize as follows:

First—That the law requires more than mere possibilities, and that the plaintiffs have only proven a possibility.

Second—That if the plaintiffs have proven a probability, the whole evidence clearly shows that the defendant has proven an equal probability to offset that of the plaintiffs, viz., that the deceased was not struck by the sway spout. In direct support of this assignment, we quote at some length from the case of Hughs vs. Railroad, 91 Ky., 526, syllabus: "In an action to recover damages for any injury arising from the defendant's neglect, the burden of showing neglect is upon the plaintiff; and if the evidence shows that the injury resulted from one of two causes, only one of which was due to the defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and it is not competent for the court to leave the question to the jury."

Second—"After a freight train had passed through several tunnels in close succession, a brakeman was found upon the top of one of the box cars, which was higher than an ordinary box car, in a dying condition. There were loose timbers hanging from the roof of one of the tunnels, and the theory of the plaintiff is that his intestate was struck by one of these timbers, while the theory of the defendant is that his injury was due to his failure to take the usual precaution to sit or lie down by the brakes in passing through the tunnels, it being impossible to pass through one of the tunnels standing upon an ordinary box car. The evidence does not show the position of the loose timbers in the tunnel in which the plaintiff claims the accident occurred. Held: There is nothing to show that the injury occurred in the tunnel in which the hanging timbers were; and, even if there were, there is nothing tending to show that it was caused by the hanging timbers; therefore, the court did right in giving a peremptory instruction to find for the defendant."

The court, speaking through Chief Justice Holt, uses this language: "Mary Hughs, widow of William Hughs, sues

for damages upon the ground that his death resulted from the willful neglect of the appellee. At the close of her testimony the lower court peremptorily directed the jury to find for the company. If a prima facie case had been made out, or if, indeed, there was evidence tending in any degree to show a right of recovery, this was error. The deceased was a brakeman upon appellee's road; he had been so for nearly a year; during the time he had passed over the portion of the road where he was killed once, and sometimes more than once, per day. * * * * If the deceased, knowing he could not pass through these tunnels standing on the top of the car, neglected to take the usual precautions of stooping or sitting down, there can be no recovery. There is no evidence showing whether he was thus injured, or whether it was caused by the alleged hanging timbers. We are left, therefore, to theorize as to this. One suing to recover damages from injury arising from conscious neglect must offer some testimony conducing to show it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way. It cannot be found without evidence. The complaining party must not only show the injury, but also some evidence that the other party is to blame for it. Mere proof of injuries, with attending circumstances, showing that the party charged with neglect may be blameless, or may be at fault, will not do. Circumstances are merely presented upon which one may theorize as to the cause of the accident. The burden of showing neglect rests upon the complainant, and under such circumstances he has offered no evidence tending to show it. He has merely presented two or more states of cases, upon which we may theorize as to the cause of the accident. Here, first, the deceased may have been struck by the low roof of tunnel No. 7; or, second, by that of No. 6; or, third, by the hanging timber in No. 7; and only in the latter case could there be any liability upon the part of the company. * * * * It was said, in Cotton vs. Wood, 8 Common Bench (N. S.), 568, and cited with approval in Thompson on Negligence, 364: 'I wish merely to add that there is another rule of the law of evidence, which is one of first importance, and fully established in all the courts, viz., that when the evidence is equally consistent with either view—with the existence, or non-existence, of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has altogether

failed to establish it. This is a rule which ought never to be lost sight of.'

"When it is necessary to show a certain state of facts, it is not sufficient to prove two or more different states of cases, one of which may be sufficient, but either of which may equally, under the testimony, have existed. In Hays vs. Railroad, 97 N. Y., 255, it is said: 'If the accident did not result from the complainant's negligence, which is questionable, he must prove something which warrants the inference of the defendant's negligence, and not leave his case upon facts just as consistent with care and prudence as with the opposite.' The case of Beaulic vs. Railroad, 59 N. Y., 537, and Railroad vs. Shertle, 2 A. & E. R. R. Cas. (O. S.), 158, announces the same rule, and, in our opinion, it is a safe and correct one."

If, however, we are mistaken in the assumption that all reasonable minds must come to the conclusion that we have arrived at in the discussion of this proposition, we submit that the evidence which carried this proposition against the defendant before the jury, was largely made up of speculation and theory, and was thus incompetent, as contended in assignments three, four, five, six, seven, nine and ten, and on principle, when an appellate court sees that, but for the admission of incompetent evidence, there should have been a verdict for the defendant, it will declare the action of the trial judge, in allowing the case to go to the jury, reversible error.

NO NEGLIGENCE IN CONSTRUCTION AND MAINTENANCE OF APPLIANCES.

We will now take up the second proposition, to-wit: The error of the trial judge, in refusing to direct a verdict for the defendant, upon the ground that the evidence was insufficient to sustain the burden of proof, that the maintenance and construction of such a sway spout as the one at Goodwin Station, proved negligent conduct upon the part of the defendant.

This brings us to a brief discussion of the principles underlying the relation of master and servant:

First—What was the duty of the defendant to the deceased, under the particular circumstances of this case?

Since this principle has been so clearly announced by this court, we will content ourselves with quoting from the case of Reid vs. Stockmeyer, decided by Justices Harlan,

Woods and Jenkins, in 20 C. C. A., 383: "It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant, such as, with reasonable care upon the part of the servant, can be used without danger, except such as is incident to the business in which such instrumentalities are employed. So, also, it is the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises, and their surroundings. There are employments that are, in themselves, necessarily dangerous, in connection with which no position can be secure. In each case the law requires of the master that he shall use ordinary care to see that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his services without exposure to dangers that are not within the obvious scope of the employment, as usually carried on." Coombs vs. Cordage Co., 102 Mass., 572; Burkey vs. Anderson, 10 C. C. A., 442.

"The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous, in which case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method." Quoting: Tuttle vs. Railroad,, 122 U. S., 189; Railroad vs. Seeley, 152 U. S., 145; Naylor vs. Railroad, 53 Wis., 661; 73 Wis., 404; 78 Wis., 127; 90 Wis., 113; Sullivan vs. Mfg Co., 132 Mass., 396; 144 Mass., 601; 119 Pa. St., 324; 47 Minn., 128; 75 Md., 464; 120 Ind., 314.

"The servant, on his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, unless such risks are obvious, or the servant has actual or presumed knowledge of the danger. It is the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he engages, and to protect himself against known dangers, and such as can, by ordinary care, be ascertained. This duty is as imperative upon him as is the duty laid upon the master."

Since, we consider, this exposition of the law states the principles underlying the relation of master and servant as clearly as any we have ever perused, we will set it up as a standard, and measure by it the evidence introduced in this case, calling attention, at the same time, to the case of Logging Co. vs. Snyder, 20 C. C. A., 393, wherein Justice Jenkins adds more learning to this branch of the law, as follows: "The servant of mature age and of experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation, and are according to natural law. In such case, the master need not give warning of possible danger, of which both parties had equal knowledge." Citing a number of authorities.

"While it is the duty of the master to provide such appliances as are suitable and reasonably safe, that duty is one of ordinary care. The master is not required to employ the best, or the safest, or the newest appliances, but such as can, with reasonable care, be used without danger, such as is reasonably incident to the business. He is bound, as is the servant, to use ordinary care, and with respect to safeguards, when dangerous machinery is employed, the test of care is the ordinary, prudent usage of the business."

We submit that the evidence in this case, viewed most strongly in the light favorable to the defendant in error, was insufficient to prove negligence in the construction and maintenance of this tank, since the test of negligence is the ordinary and prudent usage of the business—what safeguards are commonly adopted by those in like business. The defendant introduced the evidence of many witnesses to the effect that the water tank at Goodwin, both with regard to its construction and maintenance, and especially with reference to the construction and maintenance of the sway spout, was just such as is generally in use on well-regulated railroads throughout the country; and this testimony came from witnesses introduced by the plaintiff, as well as from those introduced by the defendant. These witnesses testified:

First—That of necessity all sway spouts must hang at an angle, because otherwise it would be most inconvenient, if not impossible, for employes upon the engine to pull the sway spout down by the small chains attached thereto so as to put it into service.

Second—That the tank, with all of its appurtenances at Goodwin, including the sway spout and the angle at which

it was hung, was just such a structure as was generally used upon well-regulated railroads throughout the United States.

Third—That the construction of the Goodwin tank, prior to and at the time of the accident, was such that the sway spout would clear any one riding upon the top of a freight car, who was in the discharge of the ordinary duties of a brakeman. (Record, pp 54, 57, 120, 139, 145, 150 and 167.)

It is true that the plaintiffs in error did introduce the testimony of one R. H. Briggs, who testified that the proper railroad water tank should have attached to it a sway spout which should hang vertically when at rest, but likewise, in the same connection, states that this regular standard, as to which he testified was the standard which the road department of the Kansas City road, with which he was connected, had determined for itself. (Record, pp. 64 and 65.)

The said witness likewise, however, stated on page 70 of the Record, and in his cross-examination, that he was only familiar with his own road; that he had not observed how tanks hung upon other roads, and that he supposed that the variety in the height of cars would compel other roads to conform to the standard set by his road.

Again, on page 71 of the Record, he testifies that on other well-regulated roads in the United States he did not know how the spouts hung; and finally admitted that upon the Kansas City system the sway spouts hung at various angles; and then, over the objection of the defendant below, he was allowed to state that the reason that sway spouts actually hung at various angles upon the Kansas City system was owing to the negligence of the employes of that system. (Record, pp. 71 and 67.)

This was all of the evidence upon this point, and yet the jury found that the principles of the law above mentioned had been violated by the railroad company.

If, however, this honorable court, in reviewing the evidence, should determine that it was a custom upon the Kansas City system to hang its sway spouts vertically, or should hold that the testimony of Briggs upon this point should have been left to the jury to say whether or not this conclusion could have been drawn from it, we submit that the question was not what custom was adopted upon the Kansas City system as affecting the duty of the defendant below, but the question was, What was the general usage upon railroads throughout the United States?

Again, if we admit that the custom upon the Kansas City

system, as testified to by Briggs, definitely required sway spouts to be hung vertically; yet, if it be admitted, as it must be, that upon other well-regulated railroads throughout the United States the custom was to hang the sway spouts just as it was hung upon the Goodwin tank, then the defendant company had the right to determine as between the two methods, and if it adopted a method more hazardous to the servant, yet he could not complain thereof.

In direct support of this contention we cite the case of Logging Company vs. Snyder, supra, where this language is used: "The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous."

To the same effect is the case of Railroad vs. Seeley, 152 United States, 145, where this language is used, Justice Shiras delivering the opinion:

"The theory upon which the plaintiff proceeded in the court below was that Seeley lost his life by reason of the negligence of the defendant, a railroad company, in using in its switches what is called an unblocked frog. A frog in railroad parlance is a section of rail or several rails combined at a point where two railroads cross, or at the point of a switch for a line to a siding, or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast iron frog in which the space between the rails at the apex of the frog is filled with cast iron, but the evidence clearly was, that the defendant used the unblocked frog, although at some places the cast iron frog was used. The language of the evidence, as we read it in the bill of exceptions, was that on other great railroad systems of the West the unblocked frog was generally used. There was evidence tending to show that the unblocked frog is the better form. In this disputable state of facts the defendants asked the court to charge the jury as follows:

" 'The jury are instructed that if they find, from the evidence, that the railroad company used both the blocked and the unblocked frog, and it is questionable which is the safest or most suitable for the business of the roads, that the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the

defendant, and they should find for the defendant.' This prayer should have been given by the court."

After quoting many authorities in support there, the court uses this language: "In view of these cases, and many others of similar import, which it is unnecessary to cite, we think it is plain that the defendant was entitled to the instruction prayed for, if the case went to the jury; but that, upon the whole evidence, the prayer for a peremptory instruction in defendant's favor ought to have been granted."

To the same effect, see Randall vs. Railroad, 109 U. S., 418, which was a case where the plaintiff was injured in the course of his employment as a brakeman. It appeared, upon the trial, that he was hurt in unlocking a ground switch. It appeared, from the evidence, that the defendant was negligent; that the defendant did not have an upright switch, instead of a ground switch, as the former was safer. It was shown that the ground switch was in common use; but, at the same time, a brakeman was called by the plaintiff, who stated that, in his opinion, it was not the proper kind of switch; that he thought it was not safe there, and that it could not be unlocked, without danger, when a train was coming upon the other track. This court held: First, that it is the settled law of this country, that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Second, tried by this test, there was no sufficient evidence of any negligence on the part of the railroad in the construction and arrangement of the switch, to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witnesses was too slight.

From these cases it will be observed that the evidence introduced by the plaintiffs there, which tended to show improper construction, by showing that such construction was not used by other mentioned railroads in the United States, was of a much stronger character than was the evidence of the plaintiffs below, in the case at bar.

It will be observed that in the case of Logging Company vs. Snyder, supra, several witnesses testified that in various other mills the construction of the saw was different and safer, yet the court held that, since they could not say that

the saw used by the defendant there was not in general use, that upon this point the court should have directed a verdict for the defendant, since it introduced many witnesses showing that such a machine was in general use.

So, with regard to Railroad vs. Seeley, supra. In that case the doctrine is specifically announced that if, from the evidence, it be found that railroad companies used both the character of construction established by the defendant, as well as a different character of construction, then the defendant had the right to choose the kind of construction which it would use, and was not liable to the plaintiff for adopting the less safe construction. If this principle be applied in the case at bar, manifestly the court erred in not granting a peremptory instruction; for, if we give the plaintiffs below an unwarranted advantage in the consideration of the evidence of R. H. Briggs, the most that can be contended for is, that many well-regulated roads throughout the United States construct their water tanks and appliances just as did the defendant in the case at bar, but that one company did not so construct its tanks.

To the same effect, see Bailey's Personal Injuries relating to Master and Servant, Vol. I, pp. 22 and 21, where this language is used:

"The master is bound to use appliances which are not defective in construction; but, as between him and his employes, he is not bound to use such as are of the best or most approved description. If they are such as are in general use, that is all that can be required. The employer is bound to furnish machinery and appliances that are of ordinary character and reasonably safe, and the former is the conclusive test of the latter. Whatever is according to the general usage and ordinary course adopted by those in the same business, is reasonably safe, within the meaning of the law. Hence, where there are several methods in general use, the choice being a matter of judgment, depending upon the surrounding conditions, the owner has an absolute discretion to select, according to his own judgment. The necessary control of his business demands that this right should be strictly maintained. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of such methods as are ordinarily in general use in the business. The master's duty does not require him to provide appliances similar in kind to those that are in use in other establishments, even though they may be less dangerous than those in use by him, but

merely to furnish appliances which are proper and suitable, and this is to be determined by their actual condition, and not by comparing them with appliances in other establishments for similar work. The master's duty was expressed to be the exercise of ordinary care in furnishing such appliances as have been found safe, and are ordinarily used by others in the same business. The employer does not undertake, with the employe, that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business, reasonably suited therefor. Still less is the master to be cast in damages for error in judgment in selecting one method of prosecuting his business, or one set of machinery or appliances, on the proof that another method or appliance is better or safer, where both methods, or sets of appliances, are in common use."

To the same effect: Hewitt vs. R. R., 67 Mich., 61; Ship Bldg. Co. vs. Nutsall, 119 Pa. St., 149; R. R. vs. Hays, 128 Pa. St., 294; Henry vs. R. R., 81 N. Y., 373; Muerhead vs. R. R., 103 Mo., 251; Goodknow vs. Emery Mills, 146 Mon., 261; R. R. vs. Blake, 63 Fed. Rep., 45; R. R. vs. McDade, 135 U. S., 554; Kehler vs. Schwen, 144 Pa. St., 348; Reese vs. Hircia, Pa. St., 253; Wood vs. Heiges, 34 At. Rep., 872; R. R. vs. Warner, 36 S. W., 118; Sisco vs. R. R., 145 N. Y., 296.

Several of the cases above mentioned were decided upon facts very similar to the facts of the case at bar.

As directly in point and upon similar facts, we cite the following cases: Clarke vs. R. R., 78 Va., 711; Baylor vs. R. R., 40 N. J. L., 23; R. R. vs. Shicker, 51 Md., 47; Hughs vs. R. R., 91 Ky., 526; Sheelers, Admr., vs. R. R., 81 Va., 188; Illick vs. R. R., 67 Mich., 623; Lee vs. R. R., 86 Ga., 23; Sisco vs. R. R., 145 N. Y., 296; Allen vs. R. R., 64 Iowa, 94; McKee vs. R. R., 13 L. R. A., 820; Perigo vs. R. R., 52 Iowa, 276; Wells vs. R. R., 56 Iowa, 524; 113 Pa. St., 490; 17 At. Rep., 491.

ASSUMED RISK.

Again, if we are mistaken upon the proposition just discussed, we contend that the burden of proof was upon the plaintiffs, to show that the dangers incident to the construction and maintenance of the sway spouts were not risks assumed by the deceased, and that the evidence in this case was wholly insufficient to sustain plaintiffs' case upon this point, for we contend that, irrespective of the burden of proof, and, had the burden upon this point been placed

upon the defendant below, still the evidence is insufficient to sustain this necessary proposition. It is an undoubted rule of law, as stated in the case of Reed vs. Stockmyer, that "the master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous; in which case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method. The servant, on his part, assumes the natural and ordinary risks attendant upon his employment; he does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, *unless such risks are obvious*, or the servant has actual or presumed knowledge of the danger. It is the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he engages, and to protect himself against known dangers, and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master."

Again, the case of Logging Company vs. Snyder, 20 C. C. A., 393, uses this language: "The servant of mature age and experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation and are according to natural law. In such case, the master need not give warning as to possible danger of which both parties had equal knowledge."

If it be admitted, therefore, that the defendant company had failed to provide the servant with such a place to work in, as is customarily given servants of like character on the well-regulated railroads throughout the United States, we earnestly contend that since the use of the water tank at Goodwin Station, with its appurtenances, its construction, and maintenance, and the dangers incident thereto, were perfectly obvious to an experienced railroad employe, such as McDade is admitted to have been; that McDade assumed the risk of being struck by the tank as he passed under it, riding upon the tops of freight cars, and, therefore, the court erred in refusing to grant the defendants a peremptory instruction.

The evidence clearly shows, as set forth in the statement of the case, that John I. McDade was an experienced railroad brakeman, that he had been employed in the railroad business for some twelve or fifteen years prior to his death, and had occupied positions both of brakeman and

conductor, and had served on several different railroads in these capacities. (Record pp. 15 and 17.)

That since the 24th of June, 1900, a period of over two months before the date of his injury, McDade regularly ran upon the freight trains of the C., O. & G. R. R. Co., daily performing the duties of head brakeman; that he had been performing these duties upon that division of the defendant railroad company upon which is situated the Goodwin tank, for about six weeks prior to his death, and since the 24th of June he had always been engaged upon those parts of the defendant railroad company upon which was situated tanks of like character as the one at Goodwin Station. (Record, pp. 15, 38, 82, 114 to 117.)

If it be admitted that McDade was seated upon the Illinois Central furniture car at the time of the accident, it is also clearly shown that the said furniture car had been delivered to the defendant railroad in the usual interchange of business, and that such cars had been frequently handled by the defendant company some time prior to the date of the employment by it of McDade, and that these cars were frequently handled by the said railroad during the time that McDade worked upon that portion of the road which passed Goodwin Station. (Record, pp. 57, 58, 111 and 114 to 117.)

It is likewise admitted from the time that McDade was employed by the defendant company, there had been no change in the maintenance and construction of the water tank and the sway spout attached thereto, both with regard to their physical condition and with regard to the angle at which the sway spout was hung.

It is likewise proven that it was the duty of one occupying McDade's position to have kept a careful lookout for all structures situated near to or projecting toward the track. (Record, pp. 45, 46 and 54.)

It is also uncontradicted that McDade was frequently attached to trains of the defendant company, in which were situated furniture cars of like measurements as Illinois Central car No. 28,149, and while working as brakeman on said trains, had passed the Goodwin tank many times prior to the date of the accident, both in the day time and in the night. (Record, pp. 111 and 114 to 117.)

It is likewise agreed that the night of the accident was clear, and that the electric headlight of the engine threw a light upon the water tank, fully disclosing it and its appurtenances, including the sway spout, to any one on the

cars situated as McDade was situated, for nearly a mile before the train reached the tank. (Record, pp. 151 and 154.)

It is likewise clearly shown that McDade had finished giving the signal for Goodwin tank, before the train reached the tank, as this signal was given at a distance of one-half mile west of the tank, and merely consisted in the simple raising of a lighted lantern. (Record, pp. 40, 41, 82, 83 and 84.)

It is uncontradicted that the position of a brakeman on top of the cars is left to his individual judgment, so that there was no necessity for McDade to have been in a sitting position as the train passed Goodwin tank, but that he could have chosen any position that suited his pleasure, since he had no further duties to perform after giving the signal, which would have required him to have assumed any particular position, and there was no apparent necessity for the said McDade to descend the ladder upon the side of the car.

We submit that, bearing in mind the principles of law announced in the above quoted cases, that there can be found no stronger case than this for the correct application of the rule of assumed risk upon the part of the servant. Here the deceased was a man of experience in the railroad business; he passed and repassed the Goodwin tank daily for a period of nearly two months before he was injured; it was his duty to look out for projections towards the track; he knew that he was passing Goodwin tank, for shortly before the accident occurred he had signaled the engineer to proceed through Goodwin without stoppage. The night was clear, and McDade was looking toward the engineer, who was seated in the engine cab east of the position that McDade occupied; so, therefore, McDade must have been looking directly toward the Goodwin tank, which was situated directly in his front, and just a few feet from the outside of the track. Besides this, the electric headlight fully disclosed the tank and sway spout for nearly a mile. This being the condition of things, all that was necessary for McDade to do was merely to survey the highway ahead of him, and simply keep his eyes open, and he must have seen the tank and sway spout. Had he perceived the sway spout, and exercised the slightest degree of care, he could have escaped the dangers incident thereto by merely stooping his body a few inches either toward the north, or by leaning his body

back a few inches toward the south, or, for that matter, by turning sideways, stooping either to the east or west, or by sitting a little further back on the car.

Again, it was not necessary for McDade to seat himself upon the side of the car in order to give the signal, which was given as the train approached Goodwin, but he could have stood upright and thus escaped the danger of being struck, since it is admitted that the particular position in giving the signal was left to his discretion, his duty only requiring him to occupy such a position as would enable the engineer to see the signal, and as would enable him to avoid obvious dangers that might affect himself. It may be argued that it was merely temporary forgetfulness upon the part of McDade that prevented him from realizing the danger and avoiding it, but as is well said in Beech on Contributory Negligence, Section 37: "Where one knowing the danger temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse, but if he knows he must remember at his peril, and not to remember is contributory negligence, if it occasions the injury, as where a person familiar with a dangerous railroad crossing, in a fit of absent-mindedness, omitted to ascertain whether a train was coming, and consequently was injured." Quoting Railroad vs. Whitacre, 35 Ohio State, 627; Burker vs. Covington, 69 Ind., p. 33; Bassett vs. Fisk, 75 N. Y., 303; Reid vs. Balston, 76 N. Y., 329.

It may also be argued that the danger was not an obvious one, but what could be more obvious than the angle at which this sway spout was hung, since it projected toward the track, over which the deceased rode daily?

Again, it may be argued that, in passing, a man of ordinary care would not pay particular attention to the exact distance that the sway spout cleared the tops of the freight cars. While this might be true, with regard to a passenger, or with regard to one whose duties did not require him to be so frequently upon the tops of cars, yet where one is required to ride daily, sitting, and standing, upon the tops of freight cars of different heights, certainly the exercise of the slightest degree of care would cause such a one to ascertain such a distance, and the danger, if any, incident to this projection.

It may be argued, also, that upon the night in question, the deceased was riding upon a car higher than the ordinary box car; but it will be remembered that this car was taken in the usual interchange of business, and that the

defendant was not negligent in receiving such car to be carried over its road. It will also be remembered that such cars were frequently handled by the defendant company during the period that McDade was occupying the position of head brakeman, and in trains which passed the Goodwin tank frequently, both during the day and during the night. To say, then, that McDade did not know not only the condition of the sway spout, but also that he did not realize the dangers incident thereto, is to say that McDade was not a man of ordinary intelligence, while the proof is just to the contrary. It is not required of the defendant to show that McDade had actual knowledge either of the condition of the tank or of the dangers incident thereto, for, as above quoted, it is the duty of the servant to use ordinary care to ascertain the dangers attending the service in which he engages, and to protect himself against known dangers, and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master. If the servant be of mature years and of ordinary intelligence and experience he is presumed to know and comprehend obvious dangers. In such a case "the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his service, merely because he had been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment."

Reid vs. Stockmyer, 20 C. C. A., 243. Now, if the rule be that where the servant is of ordinary intelligence and experience that the master is not liable for injuries even without the scope of the employment when the dangers are obvious, certainly the servant is presumed to comprehend obvious dangers within the scope of his employment.

The case at bar likewise calls for the application of the rule laid down in Bailey, Vol. II., Section 775, sometimes called "The Equal Knowledge Rule." In actions for injuries resulting to a servant from defective machinery or appliances, the real question is, Whether the servant has had equal opportunities with his employer for observing the defective machinery, or materials, and intends to waive any objection to them." Section 776: "An employe, knowing when he solicits and accepts employment which is giv-

en him, that he must use defective tools, contracts to take them as one of the risks of the service, whether anything is said of the dangerous character of the employment, or of the defective and dangerous appliances or not. If the danger and defects are equally known and open to the observation of both the employer and employe, it can well and justly be said that they stand on a common footing. Acceptance of an employment is an acceptance of the attendant risk, even though the employment be rendered especially hazardous by the use of defective appliances."

Section 777: "Where the employer and employe are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negilgent as toward the employe, although the work may be dangerous and hazardous, and although it might be made safer by the employer if he chooses to do so." (See also illustrations cited at great length in this authority, pp. 263 to 270.)

Again, this case calls for the application of the rule that it is the servant's duty to inform himself as to defects and dangers. Bailey, Section 796: "The master has a right to expect, and such is a servant's duty, that he will use reasonable care in examining his footings and surroundings; he has a right to rely upon the probability that any one would know what was generally to be seen by his own observation. An employe must take ordinary care to observe and ascertain whether any, and what dangers, are incident to service, and must be held to the ascertainment and knowledge of such dangers as ordinary care would have disclosed.

"While an employe has the right to presume that his employer has discharged his duty, yet this rule cannot exempt him from the duty of exercising reasonable care; he cannot exempt himself from the duty of making a prudent and reasonable use of his faculties, or of heeding facts open and visible to ordinary observation."

For illustrations of this rule, see Bailey, pp. 273 to 283.

Upon prinicple, we submit that a rule holding that the deceased had assumed the risk is eminently correct, for he had just as full and ample opportunity for observing the conditions surrounding the Goodwin tank and its appurtenances and the dangers thereto, as did the railroad company. If it be contended that others had passed under the Goodwin tank in safety, and that McDade had no rea-

son to be careful at this point, then we submit the railroad company did not fail to use ordinary care in so constructing the tank. Of course, the defendant company did not know the exact position that brakemen would assume in passing this tank, and so the brakemen were in a better position by actually passing the tank to understand and appreciate its dangers to them than was the railroad company.

If it be contended that Hollowell and other employes were obliged to be careful in passing this tank, then certainly McDade should have been careful; if it be contended that McDade had no reason to consider the sway spout a dangerous projection, then the defendant company had no reason to so consider it. This exact case has never been passed upon in the United States courts; however, a question very similar was decided in the case of Myers against the railroad company, 37 C. C. A., 137, wherein it is held that where the deceased had been over the road for fifty days preceding the accident without objection, that he must be held to have assumed the risk of the dangers incident to the construction of a bridge too low for him to pass under while riding on the top of a freight car. This case distinguishes the case of Railroad vs. Mortenson, 11 C. C. A., p. 135, wherein it was held that the question of the assumption of risk from an overhead bridge was a question for the jury, and likewise that the question of negligence on the part of the company in maintaining a bridge having overhead tie beams too low to admit of a safe passage of a brakeman standing on the running board of a furniture car was also a question for the jury, but in this latter case, as the brakeman passed the bridge, his duties required him to be in the position of standing upright, which position was occupied when he was struck.

It was also claimed by the brakeman in the Mortenson case, that he had no notice of the fact that the bridge was too low to admit the safe passage of a brakeman standing on the top of a furniture car. There have been, however, several decisions both in the United States Supreme Court and in the Circuit Court of Appeals, which, upon principle, settled this question in defendant's favor.

Thus in Hunt vs. Hurd, 39 C. C. A., 226, it was held that the making of a flying switch by a railroad company in its yards in the day time, and in the usual manner, is not neg-

ligence, *per se*, as to an employe working in the yard, but that the said employe assumed the risks of the same.

In the case of Logging Co. vs. Snyder, 20 C. C. A., p. 390, it was held that the dangers incident to the absence of safeguards upon a jump saw were risks assumed by the employe.

In Reid vs. Stockmyer, 20 C. C. A., 381, that the negligent, though usual use of wedges in a stone quarry, in which the servant was employed, was assumed by him.

In the case of Southern Pacific Co. vs. Seeley, 152, U. S., p. 145, it was held: "In an action to recover from a railroad company damages for the death of an employe by catching his feet in an unblocked frog while uncoupling cars, and while in that condition being run over by the car; where the evidence shows that he had been in the employ of the defendant for several years as brakeman, and as conductor of freight trains, that his duty brought him frequently into the yard in question, and the necessary view of the frog therein used, it must be assumed that the deceased had full knowledge of dangers arising out of the unblocked frogs, and cannot recover.

The court quotes, with approval, the case of Sheets vs. Car Co., 756 Mich., 132, as follows:

Cooley, J.: "From this state of facts it will appear that if the defendant has been guilty of negligence which contributed to cause the injury, it is to be found in the fact that a machine is made use of which is not so constructed as to guard as well as it might against simple accidents. Such danger as would result from making use of it was perfectly apparent, and would seem to be easily avoided."

The court also quotes, with approval: Wash vs. Whitler, 21 Q. B., 271; Sweeney vs. Envelope Co., 101 N. Y., 520; Hoskins vs. the Railroad, 119 Mass., 419.

In Kohn vs. McNulta, 147 U. S., 248, it was held—1. That a railroad company is guilty of no negligence in receiving in its yards and passing over its lines, freight or passenger cars the couplings of which are different from those it owns and uses.

2 A watchman who has been engaged in coupling cars in a railroad company's yards for over two months, before the accident, and is familiar with the tracks and yards, and experienced in the business, cannot recover of the company by whom he was employed, for an injury to an arm

by its being crushed between the cars, although the cars were those of another company, and the couplings thereon were different from those used by the employer.

3. Where an employe is not placed by the employer in a position of undisclosed danger, but is a matured man doing the ordinary work which he had engaged to do, and risks of which work were obvious to any one, he assumes the risk of the employment, and no negligence can be imputed to the employer for the accident to him therefrom.

Tuttle vs. the Railroad Co., 122 U. S., 114, holds that the servant assumes the risk of imperfect and faulty construction of curves in the tracks of the railroad company within its yards.

Randle vs. the Railroad Co., 109 U. S., holds that a brakeman assumes the risk of the dangers incident to the use of the ground switch. To the same effect see McDade vs. the Railroad, 135 U. S., 554.

We submit upon principle that if the servant is held to have assumed the risk of dangers incident to the use of couplings, switches, the absence of safeguards from machinery, and also from unblocked frogs, there is no reason why the deceased in the case at bar should not be held to have assumed the risks of the dangers incident to the hanging of the sway spout.

Again, there is no proof that this was an unnecessary exposure of the servant to danger, since it was clearly shown that the reason why the sway spout was not hung vertically was because, if it was hung vertically it would have been inconvenient, if not impossible, for the employes to have used it, and hence its construction was not necessary. As has been well said, there are certain employments that are necessarily dangerous, and that cannot be made safe. The great weight of authority is in favor of our contention on this point. Elliott on Railroads, Vol. III., Sec. 1269, uses this language: "Many courts hold that structures erected or suffered to remain so near the track as to endanger the safety of employes while engaged in the performance of the duties required of them by their contract of service, constitute a breach of the employer's duty to exercise ordinary care to put and keep the working place in a reasonably safe condition for use. Other courts, however, hold that the risk from structures near the track is one of the risks of the service which the employe assumes. It seems to us that where the employe has knowledge, or is chargeable with knowledge of the existence and

situation of such structures, he assumes the risks of dangers from them, for we can see no reason why the general rule that an employe assumes the risk of the dangers of the service does not apply, but if the employe does not know of the danger he is not chargeable with knowledge of it, and if it is caused by the employer's negligence, the employer is liable.

"The distinction is made between cases where the obstruction is a temporary one, and cases where the structure is of a permanent nature. We think there is just ground for such a distinction, but that if the employe knows of the obstruction, and does not use necessary care to avoid injury from it, he cannot recover.

"Some of the courts seem to require proof of actual knowledge in order to exculpate the employer, but we think this view erroneous, for if the facts are such as make it negligence on the employe not to know, there can be no recovery."

The courts which adopt the view that the servant assumes the risks incident to overhead and projecting structures, many of which go even beyond the rule announced, as in Elliott, above, are the courts of Alabama, Kentucky, Kansas, Minnesota, Vermont, Indiana, Georgia, South Carolina, New Jersey, New York, Maryland, Missouri, Pennsylvania, Virginia, Massachusetts, Wisconsin, Michigan, Texas and Iowa.

These cases proceeded upon the theory that there should be no exception of overhead and projecting structures from the general rule, that the risks of obvious dangers are assumed, and hold that nothing could be more obvious than the dangers incident to such structures. It will not be our purpose to quote at length from each of these cases which are cited below, but simply to call the court's attention to those cases wherein the facts are similar to the facts of the case at bar.

See Fisk vs. Railroad, 158 Mass., 238; Lovejoy vs. the Railroad, 125 Mass., 79; Thain vs. Railroad, 161 Mass., 353; Skidmore vs. the Railroad, 89 Wis., 188; Ciscoe vs. Railroad, 145 N. Y., 296; Seemore vs. Maddox, 16 J. B., 26; Lyon vs. Railroad, 10 Ont., 745; Jennings vs. Railroad, 7 Wash., 275; McKee vs. Railroad, 83 Iowa, 616; Clark vs. the Railroad, 28 Minn., 128; Raney vs. the Railroad, 71 Miss., 164; Railroad vs. Henderson, 142 Ind., 590; Railroad vs. Finnie, 42, W. E. 816; Jolley vs. Railroad, 93 Mich., 370; Railroad vs. Summers, 71 Tex., 700; Platt vs.

Railroad, 84 Iowa, 694; Bailor vs. Railroad, 40 N. J. Law, 723; Clark vs. Railroad, 78 Va., 709; Railroad vs. Strickler, 57 Md., page 47; Hughes vs. Railroad, 91 Ky., 520; 81 Va., 188; Illick vs. Railroad, 67 Mich., 632; Lee vs. Railroad, 86 Ga., 231; Allen vs. Railroad, 64 Iowa, page 94; 88 Ga., page 210; 52 Iowa, 276.

Third— We submit that in the case at bar the evidence clearly showed that the deceased was guilty of contributory negligence, as well as that he assumed the risk of the dangers incident to the construction of the sway spout. In deciding cases of this character, courts have frequently forgotten or confused the rule of assumed risks and that of contributory negligence. That there is a distinction is plain, for the first question on the part of the defense usually is whether or not the risk was one assumed by the servant. In the discussion of this question it is immaterial whether the servant acted with due care or not, for having accepted the risk as incident to his employment, he cannot complain if it be such as cannot ordinarily be performed even by the exercise of due care. If, however, the risk is not assumed, then the inquiry arises as to whether the risk was in exercise of due care.

Contributory negligence has been defined by the Supreme Court of the United States in Railroad vs. Jones, 95 U. S., 439, as follows:

"Where the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover."

Many of the authorities cited above by us hold that the servant cannot recover where he has been struck by overhead or projecting structures on the ground that he failed to use ordinary care to protect himself, while other courts hold that he cannot recover on the ground of assumed risk.

We submit that in the case at bar, if either the one theory or the other be adopted, there can be no recovery. Truly, in this case it is hard to conceive how the deceased could have exercised as little care as the Record shows that he did. The mere turning of the head would have clearly discovered to him the presence of the Goodwin tank, and have revealed to him its obvious dangers; then all that he need have done was to have slightly changed his position and he would have been perfectly safe.

II.

The court erred in admitting, over the objection of the defendant, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the plaintiff, to-wit:

"Q. Mrs. McDade, what was your husband earning at that time?

"A. Seventy dollars a month.

"Mr. Wright: That is objected to, unless she knows of her own knowledge."

Said objection was overruled by the court, to which ruling the defendant duly excepted.

"A. Well they sent me a check——

"Q. Who did?

"A. The Choctaw, Oklahoma & Gulf Railroad Company, after he was dead. I have that at home. It says: 'This is for twelve days' work,' and that was for $37.75.

"Q. They sent you a check for $37.75, which they said was for twelve days' work?

"A. Yes, sir.

"Mr. Wright: That is objected to on the ground that it does not show his earning capacity, but merely what he earned for twelve days."

Said objection was overruled by the court, and the defendant excepted. (Record, p. 15.)

There are three reasons why the above mentioned evidence is incompetent:

First—The testimony upon the part of Mrs. McDade, stating what her husband was earning at the time of his death, was purely hearsay, and in no wise comes up to the standard of competent evidence. She does not state that she learned from the railroad company that her husband was earning $70 per month, but states, in effect, that the only reason why she makes this statement is because, after his death, she received a check for $37.75, which the railroad company said was for twelve days' work.

Second—The evidence is incompetent for the reason that the mere fact that the railroad company sent to Mrs. McDade $37.75 for twelve days' work of the deceased, does not in any wise tend to show the earning capacity of the deceased, which was the sole issue upon which such character of evidence would have been competent, but merely shows that for twelve days prior to his death he performed such an amount of work as would entitle him to the sum

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Second—The evidence is incompetent for the reason that the mere fact that the railroad company sent to Mrs. McDade $37.75 for twelve days' work of the deceased, does not in any wise tend to show the earning capacity of the deceased, which was the sole issue upon which such character of evidence would have been competent, but merely shows that for twelve days prior to his death he performed such an amount of work as would entitle him to the sum

of $37.75. The Record is silent as to the terms of McDade's employment, whether he worked by the day, week or month, at a regular salary, or whether he received pay according to the actual time he put in. The Record is also silent as to whether, during the twelve days prior to his death, he had performed any extra work. Consequently, all that such evidence could prove was that this was the amount of his earnings during these twelve days, and did not in any wise tend to show what was his earning capacity.

Now, the question is not what McDade earned at any particular time, but what was his earning capacity, and to allow proof that McDade earned a certain amount for twelve days before his death to show what was his earning capacity, was certainly incompetent.

Third—If we are mistaken with regard to the soundness of the foregoing grounds of incompetency, we submit that all of this evidence was incompetent on the ground that it is not competent to show what the deceased was earning merely at the time of his death, as this does not show earning capacity; for earning capacity depends upon various elements, none of which were shown by this evidence. Such elements, among others, are the supply and demand for such work as the plaintiff performed, the state of health, habits, etc., all of which enter into and make up his earning capacity.

That we are correct upon this point we cite Railroad Company vs. Howard, 6 Pickle (Tenn.), page 150, where the court used this language: "It is assigned as error that the court admitted proof of the value of crops made by the deceased, for some years before he was killed, in estimating damages sustained by defendant in error. The witness, Atkins, testified that he had known the deceased several years, and that he was a farmer, and that after proving his character and habits, he was asked by the defendant in error this question: 'During the time you were acquainted with him and his farming operations, what would be the minimum value per annum of his crops?' The witness answered: 'I suppose about $250.'

"This question and answer was admitted over the objection of the attorney for the plaintiff in error. This was error for which a new trial must be granted. It was competent to show the ability and capacity for labor of the deceased, as well as his skill, in any particular art or profession in order to show what he was capable of earning, but

not to show what was the minimum value of his crops for the past year, or years. This was mere speculation."

III.

The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of C. A. Hollowell, a witness for the plaintiff, to-wit:

First—"Q. Where was he standing, to the best of your knowledge, at the time he was giving this signal as the train was pulling into Goodwin?

"A. From the position of his lamp and the signal, I should judge he was *probably* sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge this was his position at this time.". (Record, p. 41.)

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

Second—"Q. How long had the tank been in the condition that it was on the night that this train passed by?

"A. As far as I know ever since I have passed there.

"Q. State whether or not you had ever made any observation in regard to it personally.

"A. Nothing, only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it, did you?

"A. Yes, sir." (Record, pp. 44 and 45.)

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

Third—"Q. State what is the usual custom of a head brakeman on your road and others in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their own pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes, on top of the train, looking after the train." (Record, pp. 46 and 47.)

These questions and answers were objected to by counsel for defendant, and the objection being overruled, the defendant excepted.

Fourth—"Q. State what his character was with reference to his efficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work and anything of that kind." (Record, p. 49.)

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

Fifth—"Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending, as the train was pulling through Goodwin?

"A. I don't know of any reason that would necessitate his being on the ladder at all at that time." (Record p. 55.)

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

Sixth—"Q. State whether or not, if he desired to get in such a position—that is, to descend on the ladder for the purpose of looking at anything or making any investigation—what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position?

"A. That he would naturally place it in after he had given the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab iron?

"A. It would be, evidently, when he had leaned out to pass the signal to the engineer that he would hold the grab iron with his left hand, with his lantern in the right, after being in that position, passing it to the side of the car, making it more convenient for the engineer to see him,

he would pass around the lantern to where his left hand was." (Record, pp. 55, 56.)

These questions and answers were objected to, and which objection being overruled, defendant excepted.

We will consider each of these objections to the evidence in its numerical order, first setting forth the legal grounds for each objection, and at the conclusion thereof citing the authorities in its support.

First—The court erred in admitting the following questions and answers:

"Q. Where was he standing, to the best of your knowledge, at the time he was giving this signal as the train pulled into Goodwin?

"A. From the position of his lamp and signal I should judge he was probably sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge that this was his position at this time." (Record, p. 41.)

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

This was error, as by such admission of evidence, the witness was allowed to draw a conclusion of fact from other facts, which conclusion the jury was just as capable of logically drawing as was the witness. It will be noted that when the direct question was asked the witness: "Where was McDade standing?" he did not answer this question directly, basing his answer upon his personal observation of McDade, but from the position where his lamp was found and the signal was given.

Again, it will be noted in this same connection, and directly following the questions and answers objected to herein, the witness shows by the questions and his answers that he was simply giving an opinion concerning the position of McDade, which was a speculation upon his part; for, upon page 36, continuing, the witness says:

"Q. He was sitting at the time you gave the signal?

"A. I should judge this was his position at this time.

"Q. You saw the signal given, and you could tell whether he was sitting down or standing up?

"A. Yes, sitting down, or standing on the ladder on the side.

"Q. Didn't you say he was sitting down?

"A. I say he must have been."

Second—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. How long had the tank been in the condition that it was in the night that this train passed by?

"A. So far as I know, ever since I have passed there.

"Q. State whether or not you had ever made any observation of it personally.

"A. Nothing, only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it, did you?

"A. Yes, sir." (Record, pp. 44 and 45.)

These questions and answers were objected to by the defendant; the objection was overruled and the defendant excepted.

The admission of this testimony was error, for the reason that it allowed the witness to state his own experience with regard to the water tank; not only this, but that this experience required him, the witness, to pursue a certain course of conduct with regard to his passage by said tank, when riding on freight cars, viz., that he, the witness, was obliged to be careful to keep out of the way of the water spout attached to said tank. Now, the witness was nowhere asked what position he occupied upon the cars which required him to be careful in passing said tank, nor was it in any wise shown that he occupied a similar position to the one that McDade occupied, or was supposed to have occupied, when the accident occurred. The witness was not a brakeman, but a conductor, and his position upon the cars is not shown to be the same as that of a brakeman in the ordinary discharge of his duties. Neither was the witness asked to detail his course of conduct in passing said tank, nor was he required to show what he meant by the statement that he was obliged to be careful. Whether or not a person exercises care in pursuing a certain course of conduct is generally a mixed question of law and fact to be determined ordinarily by the jury under proper instructions, and thus the ultimate question as a rule depends upon the opinion that a jury may have concerning a specified course of conduct. This opinion, however, or conclusion, of the jury must be drawn from specific facts detailed to them.

Therefore, this evidence was inadmissible, because it took away from the jury the ultimate fact as to what care was required to be used by one passing under the tank, and it allowed the witness to decide this question. Not only this, however, but the witness is not required to state what

he did in passing the tank, so that the jury might determine whether or not he really exercised care. However, the main objection to this evidence, and the one which is conclusive, is that it is not pertinent to the issue, and in no wise tends to throw light upon the main issue in this case. The question is not what care the witness Hollowell was obliged to use in passing the water spout, or whether he was obliged to exercise any degree of care; but the question is, Whether or not the defendant company had allowed its water spout to remain at such an angle as would unnecessarily endanger an employe situated as McDade was situated upon the night of the accident. That this error was harmful, can be seen at a glance, for it will be remembered that no one saw the accident, and that the plaintiff's case was made up entirely of circumstantial evidence, so that each fact bearing upon the issue was a link in the chain, which represented the issue of negligence upon the part of the defendant; and, if any link was missing, necessarily the plaintiff's case failed. Consequently, if said chain of evidence was made up of any link which should not have constituted part thereof, the case of the plaintiffs would necessarily have been weakened, if not entirely destroyed. We insist, therefore, that this evidence was prejudicial to the defendant, as it allowed testimony to go to the jury which had the stamp of expert evidence upon it, and which came from the lips of a fellow employe of the deceased, who was thoroughly familiar with railroad business, and the jury might well have been misled into the belief that since Hollowell, the conductor, was obliged to be careful to keep out of the way of the spout, that it was a dangerous contrivance; and, in short, the jury were allowed to take the opinion of Hollowell upon this point, rather than required to form their own opinion from specific facts narrated. And what has been said here concerning the hurtfulness of this error will apply to each of the other assignments concerning the admission of evidence.

This exact question is decided in R. R. vs. Ellison, 117 Ind., 234.

The other authorities in support of this assignment will be cited at the conclusion of the fourth sub-assignment under this general assignment of No. III., since sub-assignment 2 and 4 are analogous and the authorities bearing upon them are the same.

Third—"Q. State what is the usual custom of head brakemen on your road and others in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their own pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes, on top of the train, looking after the train."

These questions and answers were objected to by counsel for defendant, and the objection being overruled, the defendant excepted. (Record, pp. 46 and 47.)

The question here raised is, Whether an experienced railroad man will be allowed to state, as an expert, whether or not the conduct of the deceased, or plaintiff in a cause, constituted the exercise of ordinary prudence immediately before the accident occurred; for, since the performance of duty is the very embodiment of prudence, the statement by the witness that McDade was in the discharge of his duties, as a matter of law, was a statement by the witness that McDade was in the exercise of ordinary care. Legal negligence consists, for the most part, in the breach or omission of a legal duty. Between negligence and contributory negligence there is the difference merely between genus and species, and to constitute the latter there must be a want of ordinary care on the part of the plaintiff. Therefore, legal duty is the standard which determines the issue of negligence and contributory negligence, and it is the omission of this duty which alone constitutes both the genus and the species. Since prudence is the opposite of negligence, if one be in the discharge of his duty, the law determines that he is exercising prudence, and, therefore, for the witness to state that McDade was in the proper discharge of his duties was necessarily equivalent to stating that he was in the exercise of ordinary prudence.

We submit that it would have been proper for Hollowell, the witness, to have stated, as an expert, what the duties of McDade were, if he knew them; and, if he saw McDade immediately before the accident, he might have stated to the jury what position McDade occupied; but it was for the jury alone to say whether or not McDade was in the exercise of ordinary care, or what was its equivalent, whether or not he was properly discharging his duties. It was contended upon the part of the defendant below that McDade was not in the proper exercise of his duties, because it is admitted that it was a part of the duty of every railroad employe to note carefully the situation of all projections toward the track, and since McDade was thoroughly familiar with the situation of the Goodwin tank from experience, the defendant contended that it was his duty to have avoided the tank; yet this witness is allowed to state that he was in the proper discharge of his duties, and hence the assignment is valid, and the error was most harmful.

Again, it was error for the court to allow the witness to state that the customary position of a person riding upon the top of a freight car was a sitting position, and also to state what was customary upon the part of the employes of the defendant in this regard; for here, as before, the question was not what other employes did, nor was it an investigation of their conduct, but the issue was confined to an investigation of the conduct of the deceased, and the determination upon the part of the court and jury from this investigation whether or not the deceased exercised ordinary care. What other employes did shed no light upon this question, for other employes might have been careful or careless, according to the circumstances of the peculiar case that surrounded them, and it might be that in sitting down in one case they would be in the exercise of proper care, yet under other circumstances the fact that they were sitting down might convict them of gross negligence.

Now, the evidence that it was customary for brakemen to sit down upon the top of cars was not limited to the scene of the accident, but it was simply shown that they used their own pleasure with regard to the position that they assumed upon the top of freight cars. In brief, the defendant company merely required brakemen to perform their usual duties, such as switching, coupling and uncoupling, checking the speed of cars, and various other duties, in a careful, prudent manner; but left the particular

means or manner of performing these duties to the good judgment of its employes, and this was necessarily so from the nature of the employment; and, therefore, a mere statement that it was customary under some circumstances for brakemen to ride sitting down upon freight cars could throw no light upon the case, and could only have the effect of leading the jury to believe that McDade was in the exercise of due care, because under some circumstances it was customary for brakmen to occupy a sitting position, all of which was erroneous.

In support of this assignment, we cite the following authorities:

Rogers on Expert Testimony (2d ed.), p. 13: "The opinions of witnesses, whether experts or not, will not, according to some of the authorities, be received on the question whether a certain brake is safe or dangerous, or whether a stock car was a dangerous place for a person to ride."

See also p. 15: "The witness cannot be asked whether a person exercised due care, or whether a person was a careful driver, nor what is the ordinary, careful, prudent and safe manner of performing the services, nor whether the practice of a certain railroad in blowing its whistle was reasonable or unreasonable, or ordinary or extraordinary, nor whether the leaving of horses untied in a mill yard was the act of a careful and prudent man."

The best exposition of the rule that we have found is stated in Wharton on Evidence, Volume I., Section 434: "An expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition, however, is not sufficiently exact, and the true distinction is that the non-expert testifies as to conclusions, which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The non-expert gives the result of a process of reasoning familiar to everyday life. The expert gives the result of a process of reasoning which can only be mastered by special science."

Section 436, upon the same subject, is as follows:

"We will, elsewhere, see that, ordinarily, a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts in all matters as to which the lay mind is capable of forming a conclusion, and as to all matters of free logical inference from scientific

facts. Thus, an expert cannot be asked whether a railroad train stopped time enough for the passengers to get off, or whether it is safe to discharge passengers at a station or before reaching it, or whether it was prudent to blow a steam whistle at a particular time. So a farmer cannot be examined as to the sufficiency of bars to restrain cattle, nor can a person conversant with real estate be asked as to the peculiar liability of unoccupied buildings to fire; nor can baggagemasters, brakemen or conductors give their opinion as experts respecting the coupling of cars, and as to the danger a brakeman would incur by attempting to make a coupling under certain circumstances. So it has been held that the course which the owner of a damaged steamer ought, as a prudent man, to take, as to laying up for an examination and repairs on discovering defects in the engine which had been put into her under a contract, is not a question of science calling for the opinion of an expert. So, in an action for injuries to plaintiff caused by the upsetting of defendant's stage coach, in which plaintiff was a passenger, where a witness for the plaintiff on direct examination was asked to state if he knew, from his knowledge of the condition of the road at that time, what would be the chance for a stage coach to tip up, being driven by an ordinary careful, prudent driver. And on direct examination, he being asked whether or not, under certain circumstances, he would consider the stage overloaded, it was held that the questions were inadmissible as calling for the witness's opinion as to matters not involving professional skill, and concerning which the jury were to judge for themselves from the facts in evidence."

Mr. Wharton takes these illustrations as correct on the authority of the case of Railroad vs. Kellogg, 94 U. S., 469, where they are all cited, and to which case reference is especially made.

Hinds vs. Keath, 6 C. C. A., 232: "Asking a witness to say from his experience as a merchant whether an ordinarily prudent business man would go into partnership with another in his business without inquiring concerning it and and examining his books, calls for a conclusion which the jury could draw from the circumstances which might be proven."

Railroad vs. Myers, 11 C. C. A., 439: "Expert evidence is not competent to prove that a particular mode of coupling cars is especially dangerous."

Crane Co., vs. Columbus Co., 20 C. C. A., 234: "Upon a controversy over the quality of gas pipe guaranteed to stand a certain pressure in line where it is claimed by the seller that the pipe was injured in handling and laying after delivery, witnesses who supervised or participated in the work may testify that in their opinion the workmen were skillful, but the general question whether the line of pipe was laid with proper skill and care is not one to be determined upon the opinion of witnesses."

See also Motey vs. Marble & Granite Co., 20 C. C. A., 370.

Hunt vs. Kile, 38 C. C. A., 641: "Where plaintiff's intestate, while in the employ of the defendant, was killed solely by reason of the breaking of a rope provided by the defendant, and used in the work about which he was engaged, the only questions for determination with reference to defendant's negligence in action to recover for death are whether the rope was an ordinary and usual instrumentality in use for the purpose to which it was applied; and, if so, whether the defendant exercised reasonable care in its selection, and provided a rope of sufficient strength to sustain the strain to which it would probably be subjected; and such questions are not questions to be determined by the opinions of experts based on the hypothetical statement as to whether the apparatus was an ordinariiy safe and proper apparatus for the work for which it was used; but the question is to be determined by the jury, and from the facts in evidence; and the admission of such expert opinions is an invasion of the province of the jury, and erroneous."

On page 644 the court uses this language: "The province of the jury in this regard cannot properly be invaded by witnesses expressing their opinion upon the very subject which it was the duty of the jury to determine."

Rogers on Expert Testimony, page 32: "The opinions of experts are ordinarily inadmissible on questions of duty. Thus, it has been held that the opinion of tenders of draw bridges were inadmissible as to the necessity of keeping the gates shut, and the hanging out of lanterns for the proper protection of travelers while a draw was open in the night time. So, while witnesses cannot be permitted to express an opinion that a person performed a certain service in the manner required of him in the proper discharge of his duty; yet it is competent for any witness, having personal knowledge of the facts, to state what ser-

vices are performed by persons employed in a certain capacity in the discharge of their duty."

Now, this is the very distinction that we wish to draw in the case at bar. While it was competent for the witness to state as an expert what services are required of a brakeman in the discharge of his duty, it was alone for the jury to say whether or not McDade, the deceased, performed these services, and not for the witness Hollowell. This distinction is well set forth in the cases of Allen vs. Railroad, 57 Iowa, 626, and Railroad vs. Mackey, 33 Kas., 299.

The Iowa case uses this language in speaking of such testimony: "This testimony, in our judgment, is an expression of the opinion of the witnesses, which will plainly appear after a brief consideration. The witnesses declare certain acts of the deceased were within the line of the duty of a brakeman. While it was competent for witnesses to state as a fact what services were performed by the brakeman in the discharge of his duty, they ought not to have been permitted to express an opinion that a particular manner of performing such services was required of him in the discharge of his duty. The duty of a brakeman may be prescribed by the rules of the company, or by custom prevailing in the operation of railroads. It pertains to the particular service performed and the purposes to be accomplished. It may require him to couple and uncouple cars, to change switches, to check the speed of cars, etc. It requires him to do these things in a reasonably careful, prudent manner with a view to his own safety as well as the safety of his train. He is required to use appliances intended for the different work done by him. The discharge of his performance of the duty must be distinguished from the duty itself."

Thus, in the case at bar, it was the duty of McDade to give certain signals as he approached Goodwin Station; and Hollowell could have properly stated that this was his duty, but it was not the duty of McDade to stand on the car in any particlar position whilst giving these signals, having due regard to the fact that the train was about to pass the Goodwin tank, but it was necessarily his duty to so give the signals as to fulfill his obligation to his employer, both of performing the services required and of exercising due care to prevent injury to himself. It was for the jury alone to say from the acts detailed whether or not he performed his duty.

To the same effect see: Clark vs. City of Detroit, 32 Mich., 848; Olson vs. Tafford, 37 Wis., 330; Hart vs. Hudson River Co., 84 N. Y., 51; Hagerty vs. Railroad, 61 N. Y., 624; Bowen vs. Transportation Co., 71 N. Y., 574; Harley vs. B. C. M. Co., 142 N. Y., 37; King vs. Railroad, 11 S. W. Rep., 563; Bills vs. City, 35 Iowa, 108; Muldowne vs. Railroad, 36 Iowa, 463; Rapalje on Wit., p. 502.

Bailey on Master's Liability for Injuries to Servants, pp. 531 and 534: "An expert witness cannot state whether, upon a hypothetical state of facts, any particular manner or method is the ordinary, careful, prudent or safe manner of performing the service or act. Facts must be shown. The jury must reach the conclusion from facts." Simmons vs. Steamship Co., 99 Mass., 361; Lawson on Expert Testimony, p. —; Couch vs. Railroad, 22 S. C., 561; 12 La. Ann., 534; Way vs. Railroad, 40 Iowa, 346; Kelly vs. Fond du Lac, 31 Wis., 179; Lawson vs. Railroad, 64 Wis., 448; Meeks vs. Linder, 54 Vt., 640; Bemis vs. R. R., 58 Vt., 636; Monroe vs. Latin, 25 Kas., 352; Stame vs. Bishop, 58 Vt., 498; Amstein vs. Gardner, 134 Mass., 9; Turnpike Co. vs. Coover, 26 Ohio St., 520; Sowers vs. Duke, 8 Minn., 23; Brown vs. Turnpike, 89 Mo., 152; Enwright vs. Railroad, 33 Cal., 230; Hill vs. Railroad, 55 Maine, 439; Coates vs. Railroad, 62 Iowa, 486; Hopkins vs. Railroad, 78 Ill., 32.

Fourth—The court erred in admitting, over the objection of the defendant below, the following question and answer:

"Q. State what his character was with reference to his efficiency or inefficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work, or anything of that kind." (Record, p. 50.)

Here the court allowed proof of the general reputation of the character of the deceased with regard to carefulness and prudence to be considered by the jury in determining whether or not the deceased exercised due care at the time of the accident, which issue was one sharply drawn and earnestly debated.

There are two grounds of objection to the admission of this evidence:

First—That the manner in which McDade had handled other trains, had done his work, and everything of that kind, had no relevancy to the question how he acted at the time of the accident.

Second—That the evidence was merely an expression of opinion of the witness as to the intestate being a careful, prudent man.

First—Was the evidence relevant? All this witness could say was that, on the different occasions, where the conduct of the intestate had been noticed by the witness, the intestate had been careful in handling trains. It is obvious that there are many degrees of care, from the slightest to the greatest; and it is likewise obvious that the circumstances of different cases determine whether or not due care has been shown, the test of proper care being usually determined by the dangers to be reasonably apprehended on account of a failure thereof, and the act under discussion is affected and given character by all of the relevant circumstances surrounding the transaction. This is manifest, since every case has its peculiar circumstances, and these must be taken into consideration in determining whether or not in a particular case reasonable care was exercised. Hence, what might be reasonable care in one case might fall far short of it in another.

Consequently, the conduct of the plaintiff upon other occasions would not tend to show whether his conduct was careful or careless upon the occasion in question; and, furthermore, in each instance, when the conduct of the intestate was under the notice of the witness, there might be made a question whether in fact care was exercised by the intestate, involving a long investigation, thus causing the minds of the jury to leave the main issues in the case and seek the by-paths of collateral investigation.

Second—With regard to the second ground of objection, the witness testified, in effect, that deceased was a careful and prudent man. If the witness intended to be understood, and was understood as stating that the intestate acted carefully and prudently on other occasions, then we have already disposed of this question; but if the language is construed to mean that the character of the intestate for prudence and care generally was good, then manifestly the evidence was merely the expression of a naked opinion. It would be simply saying that the witness had seen the intestate on various occasions act with care and prudence in the handling of trains, and that his conduct on these occasions was sufficient to satisfy the witness that the intestate had a good character for prudence and care, which would lead the intestate to exercise

those qualifications on all occasions in the management of trains. This would be necessarily the expression of an opinion, or conclusion, which the mind would arrive at by a process of reasoning from the evidence.

Furthermore, care, or reasonable care, is a deduction from all of the facts of a particular case, which must be carefully considered in order to ascertain whether or not it was exercised, and thus the jury would be required to determine the conduct of the deceased upon all of these occasions.

Upon the question concerning the admissibility of evidence of the general character or reputation for prudence or care upon the part of a party to the record, we cite the following authorities:

Morris vs. East Haven, 41 Conn., 252, holds: "In an action against a town for an injury to the plaintiff's intestate through a defect in the highway causing his death, the plaintiff, to prove the intestate was driving with ordinary care, called several witnesses, who, having testified that they had seen him drive horses, were asked if he was a careful driver. Held: That the inquiry was inadmissible, both as calling for a mere opinion and on the ground of irrelevancy."

From the case just quoted our reasoning upon this assignment has been taken, together with much of the language thereof. Railroad vs. Conlan, 101 Ill., p —; Coates vs. Railroad, 62 Iowa, 486.

Bryant vs. Railroad, 56 Vt., 712, uses this language, Royce, C. J.: "The first exception urged by the defendant is to the exclusion of the testimony of its roadmaster as an expert, as to whether or not McNulty, the defendant's section foreman, who had charge of the section where the fire originated, was a careful, prudent and attentive man in the discharge of his duties. It is claimed that the evidence offered was admissible upon the question as to whether or not the defendant had used all due care and diligence in its management of the railroad. The rule laid down in Pierce on Railroads, 296, and abundantly sustained by authority, excludes expert evidence on matters equally within the knowledge of the jury, or of unskilled persons, or upon the ultimate fact to be proved by the jury, and various instances are cited, which on principle exactly meet this case. The character of McNulty for care, prudence and attention in the discharge of his duties must be decided on the evidence of his acts in this case, and upon

these the jury was quite as capable of forming an opinion as any expert could be. Besides, general evidence of care and prudence at other times would have no tendency to prove care in this particular instance."

Directly in point, and controlling upon this court is the case of Delaware, L. & W. Railroad Company vs. Converse, 139 U. S., 469-477, where this language is used:

"Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks between 6 and 7 o'clock in the evening on his way from Jersey City to the country farm, showed negligence upon his part. Plainly this evidence was irrelevant. It did not in any wise illustrate the issue as to whether the defendant was guilty of negligence or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the country farm, attempted to cross the railroad tracks."

This exact question has likewise been decided by the United States Circuit Court of Appeals, Eighth Circuit, in the leading case of Harriman vs. Pullman Palace Car Company, 29 C. C. A., 194, where this langauge is used: "The sole question for consideration on the present record is whether prejudicial error was committed by the trial judge in permitting the defendant company to introduce testimony tending to show that the porter, through whose fault the injury complained of was alleged to have been sustained, was usually careful, competent, courteous and attentive. Such testimony was admitted during the progress of the trial, over the plaintiff's objection, and to its admission counsel for plaintiff duly excepted. The rule is well established by many authorities that an employer, when sued by one who has sustained an injury in consequence of a particular negligent act on the part of his servant, is not at liberty to disprove the charge by evidence tending to show that the servant was a person of general good repute, who, in the discharge of his duties, had always theretofore displayed the requisite skill and caution, because such evidence is not relevant to the issue, and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant. Persons sometimes fail to exercise ordinary care, although as a rule they are careful, and for this reason proof that the servant is generally prudent and cautious has no necessary tendency to show that

on a particular occasion he was not negligent. Besides, the practice of establishing the quality of one's act in a given instance by his conduct at other times, or by his general line of conduct, would have an inevitable tendency to create collateral issues. When, therefore, a complaint does not charge incompetency, but simply alleges that an employe acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue." Thompson vs. Bowie, 4 Wall, 463; McDonald vs. Inhabitants, 110 Mass., 49; Towle vs. Improvement Co., 98 Cal., 342; 33 Pac., 207; Adams vs. Railway Co. (Iowa), 61 N. W., 1059; Connors vs. Morton, 160 Mass., 333, 335; 35 N. E., 860; 2 Thompson Neg. p. 804; Jones Evidence, Art. 162.

It may be contended by opposing counsel that this evidence was admitted solely for the purpose of showing the value of the life of McDade to his family, but we submit that this was clearly shown by the testimony of his wife, who testified concerning the amount of money that McDade gave to his family each month; and, again, even if it were competent for Hollowell to testify concerning his general character as a man, this point was made by his answer on page 49 of the Record, that McDade's character was first-class, and that he was a first-class railroad man in all respects, and, therefore, it was unnecessary and improper for the plaintiffs to go further and show his reputation for carelessness or prudence.

While it is true that there is some authority holding that in cases where no one witnessed the accident, that evidence of the habits of the deceased may be introduced in order to rebut any presumption of contributory negligence upon the part of the deceased, this rule, however, irrespective of its logical soundness, can have no place in the courts of the United States. It is founded upon the idea that the burden of proof upon the question of contributory negligence is upon the plaintiff below, while the rule of the United States courts is to the effect that the burden of proof upon this point is upon the defendant; and an examination of these cases will show that they are all decided in jurisdiction where the burden of proof upon the question of contributory negligence is upon the plaintiff. Thus, there could be no legitimate object in the proof, as an original proposition, that the habits of the plaintiff

showed him to be a prudent man, if the law presumes that he acted prudently in the case at bar. Again, upon principle, these cases are not sound, because they proceed wholly upon the theory that there are no eye-witnesses to the accident, and even in those jurisdictions wherein this rule obtains such evidence is not admissible when there is an eye-witness to the transaction. This theory cannot be sound, for the reason that evidence is not rendered competent or incompetent in personal injury suits merely because of a lack of eye-witnesses. Any evidence which would be competent in one case would certainly be competent in another. To illustrate: If the facts of an accident be narrated by witnesses, yet if the facts be such as to lead reasonable men to differ concerning the conclusions to be drawn from these facts, if the theory of these cases be correct, and if in any wise general character has a tendency to characterize a particular act, certainly it should be admitted to carry the balance one way or the other. Thus, in criminal cases, for a long time the idea was advanced that it was only in cases where the evidence was evenly balanced that evidence of the good character of the defendant could be proven, but this theory has been abandoned, for, as Mr. Wharton well says: "Frequently evidence of character makes a case evenly balanced and results in the acquittal of the defendant."

The great weight of authority is in favor of the proposition that evidence of the general character of the deceased for care and prudence, is incompetent.

Gahagen vs. Railroad, 1 Allen, 189, Hoar, J.:

"The exceptions show that the principle issue in the case was upon the unreasonable or negligent conduct of the defendant's servants in the use of the highway at the time the plaintiff's intestate received the injury for which she seeks compensation. We think their habits at other times had no legitimate bearing on the issue, and that evidence respecting such habits was properly excluded."

Robinson vs. Railroad, 7 Gray, 92: "The defendants could not have shown their general carefulness as an excuse for their conduct at the time in question. The cases cited by plaintiff depend upon a different principle where the acts proved might fairly be regarded to be a preparation for or commencement of the principal fact to be established, and hence the plaintiff could not be allowed to prove the general reputation of the defendants for carelessness."

Kenney and wife vs. Tuttle, 1 Allen, 185, is as follows: "In an action for an injury received from a collision of carriages in the highway, in which the negligence of the defendant consisted in leaving his horses on his own land near the highway without being tied or under the charge of any person, evidence that the defendant was a careful, prudent and cautious man is inadmissible to negative the want of ordinary care upon his part."

To the same effect see Buxton vs. Potters Works, 121 Mass., 446.

Breman vs. Township, 67 Wis., 223: "In an action for personal injuries sustained by plaintiff while riding on horseback by reason of a defect in the highway, evidence that he was an habitually reckless and careless rider is inadmissible."

Chase vs. Railroad, 77 Maine, 64, holds as follows: "The intestate Schlay collided with a train at a railroad crossing; he thereby received injuries and soon after died. He never was conscious enough after the injury to tell how it happened. No one was with him at the time. No one saw him at the moment of the accident. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion to his general character for carefulness. We think this was over-stepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good. If in civil cases a person's character proves carefulness in one instance, why not in all? When and how can a true line of distinction be drawn, for if by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in every case? In many litigations under such a test there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer, and of every man concerned in the management of the train?"

To the same effect, see Elliott vs. Railroad, 41 N. W., 762, wherein this language is used: "The correct determination of this question should not be made to depend upon the fact whether the deceased was usually careful or careless, but on his conduct at the time of the accident."

Allen vs. Railroad, 57 Iowa, 626; Rowl vs. Fowler, 37 Conn., 348; Cook vs. State, 24 N. J. L., 843; Railroad vs. Ellison, 117 Ind., 234; City vs. Springfield, 166 Ill., 22; 39 Fla., 535; 68 Georgia, 236; 102 Ala., 193; 55 Kas., 62; 97 N. Y., 112.

Rogers on Expert Evidence, page 32, uses this language: "The opinions of experts are ordinarily inadmissible in questions of duty." Black on Accident Cases, Sec. 39; Sherman and Redfield on Neg., Sec. 207; Beach on Contributory Neg., Sec. 21, note.

Sixth—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. State whether or not, if he desired to get in such a position; that is, to descend on the ladder for the purpose of looking at anything or making any investigation, what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position?

"A. That he would naturally place it in after he had finished giving the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab iron?

"A. It would be, evidently, when he leaned out to pass the signal to the engineer that he would hold the grab iron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

These questions and answers were objected to, and which objection being overruled, defendant excepted.

The admission of this evidence is so clearly erroneous that extended argument upon it is unnecessary. The witness had already testified to the position upon the car in which McDade's lantern had been found. He had likewise testified that the last time he saw McDade was when he was giving the signal as the train approached Goodwin Station. Now, to allow the witness to state that the lantern was found in a position that McDade would naturally place it in is to allow the witness to speculate upon McDade's character, after he had ceased to pay any attention to what McDade was doing. It will be noted that

the witness does not state that he saw McDade place the lantern upon the car, but merely gives an opinion that it was found in a place that McDade would naturally have placed it.

Again, the next question and answer is necessarily erroneous in that it allows the witness to enter into a speculation with regard to the conduct of McDade when he admits that he did not see McDade pursue this course of conduct. Let us briefly analyze it. He says, in speaking of the lantern and the conduct of McDade: "It would be, evidently, when he leaned out to pass the signal to the engineer that he *would* hold the grab-iron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

By the use of the word "would," and also the phrase, "Making it more convenient," it is evident that the witness was merely speculating upon the conduct of McDade with regard to giving the signals and placing his lantern; and it in effect allows the witness to state that in his opinion the theory of the plaintiffs with regard to the position that McDade occupied upon the car was a reasonable theory, and one naturally to be expected of a brakeman in the discharge of his duties and situated as McDade was situated shortly before and at the time of the accident.

IV.

The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff:

First—"Q. Mr. Briggs, describe the relative positions, as near as you can, of the water spout with reference to a passing train.

"A. Well, it should be cleared.

"Q. How much should they clear?

"A. I cannot tell you exactly; I have never located a tank myself. There is a regular standard that the road department conforms to. I know that they must absolutely clear it.

"Q. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

"A. So that it will clear everything.

"Q. What do you mean by everything?

"A. Anything in the way of the car, or a person on top." (Record, p. 65.)

The error here complained of is that the witness was allowed to state that, according to the regular standard of the road department of the Kansas City system, the spout should clear everything, and, further, to state that by everything he meant anything in the way of a car and person on top. Here the witness was allowed to state the effect of the construction of water spouts upon the Kansas City system with regard to persons on top of cars, which effect was the very issue that the jury were to try.

Again, the witness admits that he was not familiar with the custom generally on well regulated roads throughout the United States with regard to the construction of water tanks, but merely testifies what the construction of such tanks was upon the Kansas City system. (Record, p. —.)

Thus, error is committed by allowing the witness to compare the construction of the tank at Goodwin Station with the construction of tanks upon the Kansas City system, which question was not at issue—the question at issue being whether or not well regulated railroads throughout the United States constructed tanks in a like manner with the one at Goodwin, not as to whether any particular road constructed tanks similar or dissimilar. Now, it was perfectly proper, if Mr. Briggs had been generally familiar with the construction of tanks upon well regulated roads throughout the United States, to testify that the spouts hung vertically; but, even had he so qualified, it was improper for him to state that the effect of hanging these spouts vertically was to clear everything upon the car, irrespective of the position the brakeman occupied, and irrespective of the fact of the brakeman being in the discharge of his duty.

Second—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position when not in use, what would that show?

"A. It would show that the weight struck this crosspiece too soon, or that the chain is too long. I could give further information how this does happen.

"Q. Do that.

"A. Oftentimes the spouts get rammed up, or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in making the spouts in the shop they are not particular in getting the same size, so the band will go up a little further and then won't go down so far. The result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance." (Record, pp. 66 and 67.)

Here the court committed error; first, by allowing the witness to state that if the sway spout of a water tank does not go up to a vertical position when not in use that this would show that the weight struck this cross-piece too soon, or that the chain is too long. This was in effect allowing the witness to state that if the sway spout, when not in use, did not return to a vertical position that the appliances used to work the same were defective in the fact that the weight struck the cross-piece too soon, or that the chain was too long.

Thus, the evidence violated the rule fully discussed above, viz., that a witness cannot testify that a particular device is unsafe, dangerous, imprudent, or that its construction shows negligence upon the part of the defendant. We submit that this is the only construction that can be placed upon the language of the witness' answer, for when a witness states that a certain construction shows that a chain is too long, or that a weight is too heavy, manifestly the use of the weight and of the chain is the use of a defective appliance.

Second—The witness was allowed to illustrate and give what, in his opinion, was the reason why sway spouts upon water tanks do not hang vertically when in use. He states as follows:

"Oftentimes the spouts get rammed up, or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in making the spouts in the shop they are not particular in getting the same size, so the band will go a little further and then won't go down so far, and if they won't go down so far the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

Now, Mr. Briggs did not pretend to know anything about the management of the Choctaw, Oklahoma & Gulf Railroad with regard to its water tank at Goodwin, or of any other place upon the road; yet, over the objection of the defendant, he is allowed to state that the reason why spouts upon water tanks upon railroads do not hang vertically when at rest is because firemen of the said companies are careless, and because shopmen who construct the spouts are careless.

With due deference to the trial judge, we submit that there is no authority which in any wise tends in the slightest to support his decision in admitting such evidence. At best, it was a mere speculation upon the part of the witness as to why spouts upon railroads generally did not hang vertically when at rest. That this error was hurtful is manifest, because it impregnated the jury with the idea that the only reason why sway spouts did not hang vertically was because firemen and shopmen were guilty of carelessness; and this evidence came from a witness who did not know or pretend to know, either of his own knowledge or from hearsay, whether or not such was the fact upon the Choctaw, Oklahoma & Gulf Railroad Company.

Third—The court erred in allowing the witness Briggs to testify as follows:

"Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length, and the band around the spout is in proper condition. Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as 2 feet and 8 inches—in a length of 9 feet, the spout being 9 feet long—the slant 2 feet and 8 inches in that length. Please state whether that would conform to the present state of the art and of the standard tanks and spouts.

"A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled, and the defendant duly excepted.

"Q. What is the cause of it being at this angle, so that it would not clear the car?

"A. Different causes; one, the spout might have been damaged and they had to change it. If the ring of the spout is here, and they get another spout with the ring here, that makes the chain too long, and it hangs over.

They might put new chains on, but that seldom happens. But the main cause is the spout gets mashed. The fireman will give the engineer the signal, and the first thing he goes and smashes it, and they send another spout, and the men are not particular enough about putting this band in the right place, and that will control the position in which the spout hangs." (Record, pp. 67, 72, 73.)

Here the court allowed the witness, in answer to a hypothetical question based upon the evidence of plaintiffs concerning the measurements of the Goodwin tank, to state that the construction was not as the witness would like to have it. Now, the question in this case was not what the witness would like to have, but whether or not the construction of the Goodwin tank was such a construction as was generally used upon well regulated roads.

Again, upon pages 72 and 73 of the Record, the above mentioned errors were accentuated on the re-examination of the witness by plaintiffs' counsel. Thus, the following questions and answers were admitted:

"Q. Speaking of spouts on your road, state whether or not, from your observation, the spouts all hang in a position so as to clear any car or person on the car?

"A. It often happens that they do not. That is what we foremen and master mechanics are for—to make men do their duty.

"Q. What is it caused by when they do not hang that way?

"A. Inattention to their duty. They do not go according to instructions."

Then comes the question and answer especially complained of in this assignment. It will be thus seen that the witness was allowed to state that in all cases where the sway spouts upon tanks did not hang vertically when at rest that the reason therefor was because those who had charge of the management thereof were inattentive to their duty and did not obey instructions—or, in short, were guilty of carelessness.

And, again, he repeats the error complained of in subassignment 2 by stating that the firemen are careless, and improperly give the engineer signals; that the spouts are thereby smashed; that then another spout is sent for, and the men in the shop are careless and do not send a proper spout. It was in no wise competent to show that firemen and shopmen were careless on the Kansas City system as tending to show that employes were careless upon the

Choctaw system; while if the witness meant to say that the employes were careless on all roads throughout the United States, his evidence is incompetent, because he does not pretend to have any personal knowledge to that effect. The admission of this evidence was, in effect, allowing the witness as an expert railroad man, having had fifty years of experience, to state that in his opinion that both firemen and shopmen are usually careless persons, and without any personal knowledge state whether or not they were careless or careful in the case at bar.

We submit it would be improper for counsel, even in the heat of argument to make such a statement, even if the evidence showed the grossest carelessness in the case at bar, and we likewise contend that it would have been error for the trial judge, upon proper objection, not to have corrected counsel therefor, yet this evidence is admitted in a much more harmful form, and with the sanction of the lower court.

V.

The court erred in admitting the following evidence, found in the testimony of W. D. Kennedy, to-wit:

First—"Q. Now, from the way the lantern was moving at the time you saw him giving the signal, what was your best impression at that time as to his position on the car?

"A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on the brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than it is standing." (Record, p. 84.)

The court erred in admitting this evidence, for thereby he allowed the witness to state the mere fact, because it was a warm night, because brakemen generally sit on cars, and because it was easier to ride sitting down than standing up, that he (the witness) came to the conclusion that McDade was sitting down when he gave the signal as the train approached Goodwin Station.

Now, W. D. Kennedy nowhere states that he knew from personal observation the position that McDade occupied when the signal was given; but, on the contrary, on pages 83 and 84, he testified as follows:

"Q. What was Mr. McDade's position on this car at the time he was giving this go-ahead signal?

"A. That I don't know.

"Q. Did you see his lantern moving?
"A. Yes, sir.
"Q. Where was the lantern?
"A. The lantern seemed to me moving on the side of the car; he seemed to be giving the signals on the side of the car.
"Q. Which side of the car?
"A. Right-hand side."

Then follows the question and answer objected to. Now, it is true the question does not ask the witness to state the position of McDade from the way the lantern was moving, but the answer specifically states that the witness judged the position of McDade from the fact that it would be more convenient for a brakeman to be sitting than standing at this place, and this in connection with the specific statement above mentioned that the witness did not know McDade's position from personal observation, conclusively shows that our argument upon this point is correct.

We earnestly contend that the admission of the opinions and speculations of the witnesses Hollowell and Kennedy are reversible error.

There were no eye-witnesses to this accident, and the plaintiffs were allowed to map out a theory of the case, and to support this theory, not by the proof of actual facts, but by the speculation and opinion of witnesses as to whether or not such theory was reasonable, and if the evidence above complained of in assignments III., IV. and V. had been excluded the plaintiffs' case must necessarily have failed.

Again, one of the main issues in this case, and so recognized by the lower court, was contributory negligence upon the part of the deceased; and here this evidence was most harmful, because plaintiffs' witnesses were allowed to state that McDade was in the performance of his duty when last seen; that in the opinion of the witnesses he was sitting in a position where he could have been struck by the spout, and that his lamp was in a position that he would naturally place it in after having given the signal from a sitting position.

Again, one of the main issues was whether or not McDade was actually struck by the spout, and upon this point this incompetent evidence bore most strongly in favor of the plaintiffs.

VI.-VII.

The court erred in admitting the following evidence, found in the direct testimony of Dr. Frank Smythe, a witness for the plaintiffs, to-wit:

VI.

First—"Q. Doctor, assuming that the man was sitting on the side of the edge of the car, with his legs hanging over the side of the car, the car between 13 and 14 feet high, and being a part of a train which was running at a rate of speed, say, between 20 and 25 miles an hour, that he was found on the side of the track on which the train was moving, in the condition and with the injuries such as I have above described to you, please state whether or not, in your opinion, if you have an opinion of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on level ground?"

Counsel for defendant objected to said question, which was overruled, and defendant excepted.

"A. It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible."

Counsel for defendant objected to what is possible.

"Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries, such as I have described to you, could or not have been produced by falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

"A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all I can say. My opinion is that a single blow could not have produced such an injury as you have described."

Second—"Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature or surface as to receive impressions of footprints, whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that."

To this question counsel for defendant objected, the court overruled the same, and the defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate

of speed, and coming in contact with the ground, without some interruption from the fall. I can readily see how a very extensive injury could result, but I cannot see how it would produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

"Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it while the train was running 20 or 25 miles an hour, be such an instrument as would produce such injuries?

"A. There comes the question again. I don't think a blow from the pipe would produce it all, but I am satisfied that a blow from the pipe would produce the injury to the jawbone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury to soft parts."

To this question and answer defendant objected, and upon the court overruling the objection, duly excepted.

Third—"Q. In your opinion, please state whether or not the conditions and injuries described to you could or not have been produced by a combination of blows, viz., the blow from such a pipe, where the party's head comes in contact with it, when he is on a train running 20 or 25 miles an hour, and is knocked from the car, after such blow is received, falling to the ground."

"A. Yes, sir; I think the combination of blows would account, under the circumstances, for the condition the man was found in.

"Q. In your opinion, neither the falling from the car nor the blow from the pipe, under these circumstances, alone could produce that combination of injuries?"

"A. Not alone; no, sir. I am not prepared to say what happened when he fell."

To this last question and answer defendant objected, which objection was overruled, and defendant excepted.

VII.

The court erred in admitting the following evidence, over the objection of the defendant, found in the direct examination of Dr. Webb, a witness for the plaintiff, to-wit:

"Q. Please state whether or not the injuries, such as you have described, and in addition assuming that the

jawbones were crushed, and that he had a large scalp wound on the left side of his head near the rear, whether such injuries could have been produced by a fall from a car 13 to 14 feet in height, running at a rate of speed 20 to 25 miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether those injuries could have been produced alone by such a fall?

"A. I don't hardly think it could.

"Q. Please state whether or not such injuries as you saw, and in addition thereto the injuries which I have just described to you, could, in your opinion, have been produced by the party coming in contact with an iron pipe about 10 inches in diameter, the pipe striking him on the head, while in the position on the side of the car, moving at from 20 to 25 miles an hour, and his falling thereafter to the ground?

"A. Yes, I think it would, all right.

"Q. But the mere fall under these circumstances, in your opinion, could not have produced those injuries?

"A. I don't see how it could; it might have done it."

To all this evidence of Dr. Webb the defendant objected, and upon the objection being overruled by the court, the defendant excepted.

The admission of the testimony of Dr. Frank D. Smythe and Dr. Webb was a violation of the rule in regard to opinion evidence, and the holdings of the judge upon the subject were manifest and reversible errors.

In reply to a question of the plaintiff as to what blow or blows would probably cause the injuries shown to exist on the body of the decedent, Dr. Smythe said: "It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible." In other words, before he commenced his testimony Dr. Smythe admitted that the testimony he would or could give in regard to the cause of the injuries received by the decedent would be a mere matter of conjecture. The guess of an expert is no more to be received in evidence than the conjectures or theories of any other witness. This exact point has been adjudicated in favor of the contention of the plaintiff in error in Muller vs. Gillick, 66 Mo. App., 500. Here it is said: "A witness is not qualified to express an opinion as to a matter of expert opinion when

he admits his testimony would be a mere guess." See Gregory vs. N. Y., L. E. & W. R. R., 55 Hun, 330.

On this ground alone the admission of the evidence of Dr. Smythe, after he had qualified it in the manner above shown, makes all of his opinions improper testimony to go before a jury.

But even had Dr. Smythe not admitted that his testimony would be pure conjecture or supposition, there would still exist a valid objection to its admission. It would be presumptuous to announce the reason to this court for the rule that opinion evidence is not admissible unless it be the opinion of an expert, *in a matter where expert evidence is necessary.* Mr. Greenleaf, in his authoritative work on the law of evidence, page 550, section 441 (16th ed.), says: "There is, therefore, no rule admitting opinions or inferences when made by one class of persons—experts—and excluding them when made by another class—laymen—but there is a rule excluding them when they are superfluous, and admitting them when they are not." This rule laid down by Mr. Greenleaf is universally followed.

In N. C., etc., R. R. Co. vs. Carroll, 6 Heisk., 368, the court refused to allow expert testimony upon a question whether or not a certain obstacle on the track was an obstruction. "This is a matter," the court said, "which would be within the cognizance of any man, and it does not take an expert to decide the question."

Another statement of the expert rule is made by the U. S. Supreme Court in the case of Milwaukee & St. Paul R. R. Co. vs. Kellogg, 94 U. S., 449. The court declares: "One of the cardinal rules governing the admission of expert evidence is that it must usually not alone be given by an expert, but must also be of such a character as not to fall within the range of common experience and observation, and, therefore, not to be intelligible to jurors without the aid of opinion."

Was there any need for expert opinion to decide the question whether or not the injuries produced upon the body of the deceased were caused by one single blow or by two simultaneous or successive shocks? It would seem that the veriest layman would have been able to tell from the testimony, just as well as an expert, whether or not a wound on the left side of the head, and one on the front and near to the right side, could or could not have been produced by a single blow from any instrument. To introduce physicians, therefore, to pass upon this fact was to

usurp the functions of the jury, and to take from their consideration matters which were excessively within their province.

Upon this very question of the number and size of the wounds and the position of the deceased at the time they were received there have been numerous adjudications. In Manufacturers' Accident Indemnity Co. vs. Dorgan, 7 C. C. A., 581, the following question was asked: "If he had been standing, would it have been possible for him to have fallen into the water in the position in which they found him?" Counsel objected to this question, and the court held that the objection was properly sustained. This case is one that was decided by the United States Circuit Court of Appeals, and is therefore of especial value in this case.

In Kennedy vs. People, 39 N. Y., 245, the court said: "The form, length, etc., of the wounds, with their precise location on the head, with the amount of force necessary to produce them, and the probable shape of the instrument being shown, it is not competent to receive the opinion of the surgeon as to the probable position of the deceased when the blows were received. Surgeons are not supposed to be experts in the matter of giving and receiving such blows, and the jury are equally capable of drawing the proper inferences from the facts proven, if material." And further: "But on what ground it can be said that it requires the peculiar science or professional skill which physicians and surgeons possess to determine the position in which a man may be struck on the top of his head, I am not able to perceive."

In People vs. Hare, 57 Mich., 505, it was declared to be improper to ask a question of an expert, the answer of which involves his opinion as to what caused a wound of the deceased. In accord, Hitchcock vs. Burgett, 38 Mich. 501.

A question almost exactly in line with the present one was raised in the case of the Lake Shore & C. R. R. Co. vs. Shook, 16 Ohio Circuit Court, 665. The court said: "The question as to whether the deceased met his death by being knocked off a car, or by slipping off, is not a question for a medical expert."

The opinion of a physician as to whether the fact that the cart in which the plaintiff was riding was upset and dragged 200 feet by the car, would cause the injuries complained of is not admissible. Chicago City Ry. Co. vs. Smith, 69 Ill. Ap., 69.

The above cases declare correctly the rule as to the scope and limit of expert medical testimony. None of these rules were properly observed in the admission of the testimony of Drs. Webb and Smythe. Dr. Smythe was not only permitted to give his opinions, after he had admitted that all of his testimony would be a matter of conjecture, but he was allowed to testify as to whether or not one or two blows could cause the injury. (Record, pp. 212 and 213.)

He was also permitted to state whether or not the blows could have been produced by contact with the nozzle of the pipe. Dr. Webb was allowed to bring before the jury an exactly similar line of testimony; and, under the rule laid down in the above quoted cases, this was a double error in both cases:

First—Because the question was not one upon which expert evidence was required; and,

Second—Even though expert testimony were admissible in general, the particular facts as to the cause of the injury which were elicited from Drs. Smythe and Webb were not competent testimony. They were, in effect, allowed to decide the question whether or not the deceased had slipped from the car or had been knocked off, in direct contradiction of the correct rule, as laid down in Lake Shore, etc., R. R. Co. vs. Shook, supra.

The form of the questions asked Drs. Smythe and Webb was also objectionable. Dr. Smythe, in particular, was not testifying from any personal knowledge in the matter, but was basing his opinions wholly upon the hypothetical questions which had been propounded to him.

In North American Association vs. Woodson, 12 C. C. A., 692; 694 Federal, 689, it is said that it is error to permit a hypothetical question based upon suppositions which there is no evidence to support. In accord, Clarke vs. Riter-Conley Co., 57 N. Y. State, 755.

In the first case cited above questions were propounded to a medical expert which assumed that the deceased had fallen from a point near the top of a ladder on which he was standing. It had been shown in the case that the deceased did fall from such ladder, but there was no evidence to prove that the fall was from a point at or near the top.

In Green vs. Roark, 56 Pac., 329, it is said: "A party should not be permitted to ask questions which are neither

supported by the evidence, or the deductions to be drawn from the evidence."

In People vs. Harris, 33 N. E., 65; 136 N. Y., 423, it is said: "Hypothetical questions are properly excluded when there is no foundation in the case for the facts assumed."

The hypothetical questions propounded to Drs. Smythe and Webb assume in every case that the deceased was sitting upon the edge of the freight car, with his body in a certain position, and his head in an assumed direction. There was no proof in the case directly tending to show that such was the position occupied by the deceased, and to permit hypothetical questions to be based on such a supposition was manifest and reversible error.

Hypothetical questions, moreover, must be based upon all of the important suppositions or facts which have been established in the case. Western Ins. Co. vs. Mohlman, 28 C. C. A., 168; Livingstone vs. Sands, 81 Ill. App., 578.

Far from observing the rule laid down in these cases as to the form of hypothetical questions, counsel for plaintiff excluded from their questions facts which had been established in the case, and based their queries solely from a view of the circumstances which was not established or demonstrated by any of the facts before the court.

In short, Drs. Smythe and Webb were improperly admitted to testify as experts, because the questions upon which their testimony was given were not peculiarly within the scope of expert knowledge, and the jury were competent to pass upon the matter for themselves. Second, even were the subject one for expert opinion, Dr. Smythe's testimony was improperly allowed when he declared his opinion would be a matter of conjecture. Third, even were the testimony in the case admissible and solicited in the right form, the character of the questions propounded by the plaintiff would have made it objectionable. In a series of hypothetical questions facts are assumed which are not established by the evidence, and important matters which are so established are overlooked.

VIII.

The court erred in admitting, over the objection of the defendant, the following evidence contained in the testimony of Frank Sayers, on cross- examination, a witness for the defendant, to-wit:

"Q. Had this upright to which the pulleys are attached, and through which the chain passes, which connects with the water spout, been elevated?

"A. It had not been done at that time.

"Q. How did you know it hadn't?

"A. Because I noticed it after it was done.

"Q. When was it done?

"A. Eight or ten days after I made those measurements.

"Q. Did you see it done?"

Counsel for defendant here objected to any change being shown in the appliances connected with the spout after the accident occurred.

"Judge Hammond: What day of the month did you make this measurement to which you have testified?

"A. It was along about the 3d or 4th of September.

"Judge Hammond: This accident happened on the 18th of August?

"A. Yes, sir.

"Mr. Fitzhugh: Do you know the date when these changes were made?

"A. No, sir; I don't know the date, but, passing there the first time after it was made, I noticed the difference in the spout.

"Judge Hammond: Did you make your measurements before you noticed the change?

"A. Yes, sir."

Counsel for defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

Second—"Judge Hammond: At the time you made these measurements, did you notice any changes in this structure as you knew it before?

"A. If there were any changes they were so slight I could not detect it.

"Q. Was that the time, 8 or 9 days after you took the measurement, that you say you noticed the change?

"A. No, sir; I noticed it on the train in passing, but did not stop off.

"Q. When was that?

"A. I could not give it.

"Q. How many days after you took the measurements before you went back?

"A. It was probably two weeks, maybe more.

"Q. Were you not there 8 or 9 days after you took the measurements at Goodwin, Ark., after this change—after you took these measurements?

"A. I am not certain. It would be somewhat about that time."

Defendant again objected to this testimony, and upon the court overruling the objection, an exception was taken.

Continuing, the witness testified as follows, over this same objection of the defendant:

"Q. And you have not, about the times, the days or weeks, any recollection?

"A. I can say I am certain it was 12 or 14 days after I took the measurements that I noticed the change."

It is an established rule in nearly every jurisdiction in this country that subsequent improvements are not to be construed as an admission of prior negligence upon the part of the defendant. In Kansas and Pennsylvania alone has a different conclusion been reached by the courts, although Utah has, in an isolated case, given a partial allegiance to the rule. The United States Supreme Court has given the question careful consideration, and has decided that subsequent changes are not relevant to show antecedent conditions to have been negligent.

In the case of Columbia R. Company vs. Hawthorne, 144 U. S., 202, the earlier cases upon this subject were carefully reviewed and the conclusion reached that prior negligence could not be in any case inferred from subsequent changes or improvements.

Had the evidence of Mr. Sayers been introduced, therefore, to show directly that the railroad company had been negligent in the construction of its tank and appliances at Goodwin, Ark., there would have been no question as to the error of such admission. Counsel for plaintiff, however, claimed that the evidence was properly admissible because counsel for defendant had asked Mr. Sayers whether or not his measurements were made before any alterations in the tank at Goodwin. Mr. Sayers had, in effect, been asked such a question; but no details as to the character or nature of the change were sought to be introduced by the defendant, and this evidence could not, therefore, be considered as rebuttal of the evidence of the defendant.

In order to make Mr. Sayers a competent witness as to the conditions of the tank and to establish that the meas-

urements taken by him were the same as those existing at the time of the accident, it was necessary to establish the fact that no change had been made at the time Mr. Sayers' measurements were taken. The question asked by defendant's counsel was, therefore, not only relevant and proper, but was absolutely necessary. It is inadmissible to show the conditions after the accident, unless it is shown that no change has occurred in the meantime. This is an established rule and has been laid down in a number of recent cases, as well as in all of the older decisions.

See Green vs. Ashland W. Co., 77 N. W., 722; Crowley vs. Edwin, 87 Federal, 540.

See Greenleaf on Evidence (16th Ed.), Section 14—for collection of cases.

It was imperatively demanded for the defendant, therefore, to establish that there had been no change in the tank between the time that the accident occurred and Sayers' measurements were taken. Such evidence, however, could not be construed as an effort to ascertain the nature of the changes which had been made in the tank, and there was no merit in the contention of plaintiffs' counsel that specific reference to the nature of the changes was authorized by the questions of the defendant. Such specific references to the changes were repeatedly made in the course of the cross-examination. The actual date of the subsequent changes was minutely inquired into and the character of the changes sought to be ascertained. On cross-examination plaintiffs brought out the fact that the spout had been altered, and that the alterations consisted in the elevation of the spout some distance above its former position. Even if we grant that the fact of change was admissible, it would not be admissible to show the character of such change. The fact of the change, however, was inadmissible evidence, the only relevant question being whether or not the pipe had been changed at the time when the witness made his measurements. It being shown that the pipe was the same at the time his measurements were taken as it was on the day of McDade's injuries, further inquiry as to the changes was incompetent.

The scope of the rule excluding evidence of subsequent improvements, and the citation of cases upon the subject will be considered at length in the tenth assignment of error.

IX.

The court erred in excluding the following evidence of W. W. Sherwood, a witness for the defendant, which appears on his re-examination, as follows:

"Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car, and was sitting on the north side facing north, throwing his body in the position in which I am sitting, facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout, would you say from your familiarity with people being knocked off of trains and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank where the spout hit him, that he could have been knocked off by the spout?"

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question with the element in the hypothetical question that the train was going twenty-five miles an hour. This request was refused and defendant excepted.

Mr. Sherwood had qualified himself as an expert upon this subject, having testified that he was an expert trainman, and was familiar with accidents of the character and kind set forth in the testimony. Although the question did call for an opinion, which more or less embodied the issue to be decided by the jury, it was within the rule relating to hypothetical questions as clearly as those questions allowed to be propounded by the plaintiff. In the sixth and seventh assignments of error the hypothetical questions asked by the plaintiff have been set out, and it has been shown that such hypothetical questions were a violation of the established rules upon the subject as laid down in this and other courts. It is not contended here that the question asked Mr. Sherwood did not go a little further than the rule admitting expert evidence upon such subjects. If, however, the rule of the trial court in admitting the hypothetical questions of the plaintiff as set out in the sixth and seventh assignments of error was correct, the hypothetical question propounded to Mr. Sherwood was admissible. The facts assumed in this hypothetical question were those which the plaintiff had assumed to establish the theory of his case, and the question

was asked of a qualified expert upon the question. In fact, Mr. Sherwood was much more fit to deliver an opinion upon the subject of McDade's injury as regards the distance he could have traversed after the injury than were the physicians who testified as to the number and character of blows necessary to produce the wounds found upon the deceased.

X.

The court erred in admitting, over the objection of the defendant, the following evidence found in the cross-examination of G. P. Poole, a witness for the defendant:

First—"Q. Was the change made under your supervision?

"A. Yes, sir.

"Q. When was that change made?

"A. It was somewhere from the 5th to the 20th of September, probably a little later.

"Q. The 5th to the 20th of September, 1900?

"A. Yes, sir.

"Q. You can't get it nearer than that?

"A. I can't from memory. I can say, however, after the 5th, because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions were objected to, and, upon the said objection being overruled, the defendant excepted.

Second—"Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

"A. I gave a letter; I wrote a letter to all the foremen.

"Judge Hammond: Did you give him any specifications to work by?

"A. Just a letter; nothing else, only what I have stated.

"Q. Do you know of your own personal knowledge that these changes, if any, were made?

"A. Just what the men reported to me.

"Q. Weren't you there last night?

"A. Yes, sir.

"Q. Do you know whether they were made or not?

"A. I know there is a mark there; it looks to me like it had been raised."

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at the measurements that existed on the 18th of August, except by comparison, I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the objection, defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look and say a few moments ago that the bar had been elevated?

"A. Yes, sir; to the best of my judgment, three inches.

"Q. The cross-bar, that is the one upon which the pulleys hang and over which the chains run and connect with the pipe?

"A. Yes, sir.

"Q. To the best of your knowledge, that cross-bar has been elevated three inches, under the instructions given by you in September; it has been raised three inches?

"A. I judge so.

"Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout—how much, in other words, would that shorten the chains?

"A. Well, it would be guesswork.

"Q. Is it a fact that that would shorten the chains twice the amount of the elevation of the bar?

"A. Yes, it would seem so.

"Q. That it would carry the point of the spout, the nozzle, back about six or seven inches?

"A. Yes, sir; that is my idea.

"Q. Or make it much shorter, which?

"A. Carry it back; it would raise it, certainly."

The objection of the defendant was overruled as to these questions and the defendant excepted.

There was even less reason for allowing Mr. Poole to testify upon these matters than there was in permitting Mr. Sayers to bring out the fact of a change. Mr. Poole had testified that he measured the supply pipe of the tank, and that at the time he took such measurements no alterations or change had been made in the said supply pipe, and that no alterations had been made therein at the time of the trial. These facts being established, the admission of his measurements was proper, and his competency as a

witness to testify to the location of the supply pipe was established. This was the only point upon which his testimony had been sought by the defendant, and it was manifest error to permit opposing counsel to elicit, on cross-examination, the details of those changes which had been made in the sway spout between the time of the accident and the time of the measurements. The witness did not testify and had not sought to testify as to the character of the sway spout, but had confined his testimony to the location and position of the supply pipe. Opposing counsel was allowed to propound to him questions showing that the cross-bar through which the chains connected with the supply pipe passed had been elevated, and elicited the information that a slight elevation of this cross-bar would make a considerable alteration in the position of the sway spout.

Opposing counsel expressly disclaimed any intention of establishing the negligence of the company from the testimony of Mr. Poole to the effect that the supply pipe had been altered since the accident, but there was, however, no other real ground upon which such evidence could be admissible. It was contended that these measurements were allowable to establish the actual condition of the tank at the time of the accident, but for such purpose, the fact of the changed condition and the details thereof after the accident threw no light on this point, and, therefore, was clearly inadmissible.

The limitations placed upon the admission of evidence as to subsequent conditions for the purpose of showing conditions at the time of the accident have been given above, in the eighth assignment of error. It has been shown there that, in order to introduce the condition after an accident, it must be established that there has been no change since the accident. It was improper, therefore, to endeavor to secure data as to the condition of the tank at the time of the accident by introducing the subsequent repairs. In order to show the condition at the period of time when Mr. McDade was injured, it was incumbent upon the plaintiff in error to secure the evidence of parties who had made measurements at that time, or who had made them before the change.

An examination of the rule excluding subsequent repairs will show, however, that it is the wisdom of the law to exclude such testimony on whatever ground it is sought to be introduced.

About the earliest case upon this subject was decided in the Supreme Court of Vermont. Here it was held that the reason why the testimony was excluded was that there was no logical sequence which could justify an inference from subsequent repairs, of prior negligence. The conclusion here was based upon the ground of logical sequence, and the evidence was, therefore, held to be irrelevant. This was the ground which was taken in most of the earlier cases, and it was on account of this reason being given for the rule that so much confusion existed in the earlier reports upon the question of the admission or exclusion of this evidence.

The later consideration of the subject has led, however, to a change of view, and it has been held that the test of evidence in general is not, frequently, the mere possession or lack of a logical sequence or of probative value. There is a large amount of testimony which is excluded on the ground that its admission has a tendency to prejudice or inflame the minds of the jurors or confuse them as to the real issues involved in the trial.

In Greenleaf on Ev. (16th Ed.), Section 14—a., the rule is laid down that evidence which tends to produce confusion of issue or inflame the minds of the jury is on that account inadmissible, even if it does possess a certain amount of probative value.

In Abbott's Trial Practice, page 36, the following are said to be the reasons for the exclusion of evidence of subsequent repairs: "The evidence is incompetent because the taking of such precaution against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the issue and prejudice them against the defendant." The doctrine as laid down by these text writers has been followed in a number of well-decided cases.

In Corcoran vs. Village of Peekskill, 108 N. Y., 151, the court says, in speaking of the admissibility of subsequent repairs: "While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury."

In Payne vs. Railroad, 9 Hunter, 526, Learned, C. J., says: "The only way in which such subsequent acts (repairs) could bear upon the question would be as an ad-

mission that the company had been negligent, *so a jury would be likely to understand such proof.*"

In Barber Asphalt Paving Co. vs. Odasz, 8 C. C. A., 473, the court refused to allow the evidence of subsequent repairs to be introduced, and in speaking of such evidence, says: "We think that the answers having been objected to, should not have been permitted to go before the jury, for with the tendency of juries in actions for injuries to the person to find the fact of negligence upon insufficient grounds, this class of acts of the employer is received by them as an admission of prior negligence. Although the judge did not intend to allow the testimony upon the theory that it tended to prove negligence, *we think that its admission had an injurious effect, and that a new trial should be had.*"

This, therefore, seems to be the attitude of the courts at present upon the admission of testimony showing repairs after accident. Such evidence is not allowable because it is apt to be taken in an improper manner by the jury, and is likely to be construed by them into an admission of negligence on the part of the defendant.

The experience of the courts in general coincides with that of the learned judge of the Circuit Court of Appeals in the case quoted above. The jury are apt to consider slight circumstances as bearing upon the subject of negligence; and, on that account, such testimony as to subsequent repairs will influence their judgment and prejudice their minds against the defendant.

If such is the tendency of this character of evidence, a sense of fairness toward the defendants in certain cases demands the exclusion of all mention of subsequent repairs for what purpose so ever it may be introduced.

The records of the courts contain numerous cases in which this evidence of subsequent repairs has been sought to be introduced upon one theory or another. Such attempted introduction has been considered in more than one case as a pretext to get before the jury the fact of repairs in the hope that the natural tendency of juries to infer negligence would lead them to consider such changes as an implied admission on the part of the defendant that he had been guilty of negligence at and before the time of the accident.

In Clapper vs. Town of Waterford, 131 N. Y., 382, the court says: "Upon whatever pretext such evidence is put into the case, it is generally used to mislead the jury. It

is sometimes accepted by them as an admission of negligence, and its natural tendency is undoubtedly to influence them in that direction."

In this case the suit was for an injury occurring on a city sidewalk. It was claimed that the evidence of subsequent repairs was merely to show that the commissioner did have funds in his hands sufficient to allow him to make repairs as he was in duty bound to do. To same effect, see 81 Hun., 132.

In Anson vs. Evans, 19 Colo., 274, plaintiff sued on account of the breaking of a rope which had caused his fall. The court held that the evidence, to the effect that a new rope had been introduced since the accident, was not permissible. In this case it was claimed by plaintiff's counsel that the object of introducing the evidence was to impeach a witness of the defendant. The court, however, ruled the evidence out of the case.

In Fulton Works vs. Kimball, 52 Mich., 146, the plaintiff testified as to the condition of a bridge after the accident. It was held in this case that a question as to the purpose of certain changes used in the construction of the bridge was not allowable, it being sought thereby to show incidentally that the bridge had been improved and made stronger since the accident.

Lombar vs. East Towas, 86 Mich., 17 and 18. Counsel for plaintiff attempted to introduce evidence to show that repairs had been made in a sidewalk after the accident had occurred there. He disclaimed expressly any intention to use the testimony for the purpose of showing negligence prior to the accident, and claimed that the object of such testimony was to identify a board which was produced in court as the one through which the plaintiff's foot had slipped. The court held that the evidence was incompetent for any purpose, although on account of numerous other witnesses in the case, testifying to an identification of the board, they would not reverse upon this ground alone. The declaration as to the incompetency of the evidence for the purpose, however, is strong and unequivocal.

In Alcorn vs. Railroad, 108 Mo., 91, suit was brought because a switch of the railroad was improperly blocked. Plaintiff sought to introduce evidence to the effect that the switch had been properly blocked since the accident. Here also any intent to use such evidence as the basis of the inference showing negligence was disclaimed, but the court held the evidence inadmissible. The ground on

which it was sought to be introduced was to show the protective character of proper blocking, and that such blocking could be done. The syllabus is:

"Third—Other testimony could readily have been introduced to show the necessity of a proper block, and *the evident and only object of the controverted testimony was to convict the defendant company of a confession of negligence because of making repairs.*

"Fourth—The testimony for these reasons being wholly inadmissible as well as misleading, a general objection was sufficient."

In Fordyce vs. Chancy (Tex.) 21 S. W., 182, evidence was offered as to repairs made in a track, after the accident occurred. The court says of such evidence: "It cannot be held to serve any legitimate purpose in establishing the condition of the road at the time of the accident; for, after the witness had stated all facts properly admissible for that purpose, *they were allowed to go further and state in detail what had been done toward improving the track.*"

The case is directly in line with the contention made by plaintiffs in the question before the court.

In Hammarger vs. City of St. Paul, 67 Minn., 6, evidence was introduced as to subsequent repairs in a sidewalk. The contention of the plaintiff was that such testimony was admissible to show the location and the identity of the hole in the walk. The evidence was, nevertheless, held incompetent. The court says that inasmuch as no effort was made to limit the evidence to the points contended for by the plaintiff, it would be excluded for all purposes; but they say expressly that even had an effort been made to limit its scope they would not say it would then be competent.

In Bell vs. Shingle Co., 8 Wash., 27, the fact of repairs was sought to be brought out on the cross-examination of the defendant's witness with the alleged purpose of discrediting him. The court held that the evidence was irrelevant and inadmissible for this purpose.

In Dillon vs. Raleigh, 32 S. E. (N. C.), it was sought to show by evidence of the removal of certain benches what the nature of the construction was at the time of the accident. The court held that the evidence was inadmissible for this purpose. This case is also directly in line with the contention made by the plaintiff that this evidence was admissible to show the condition of the tank at the time of the accident.

In Shinners vs. Prop. Locks, 12 L. R. A. (Mass.), 554, the following question was asked: "What, if anything, was done by the defendants to the bank after the accident?" The Supreme Court sustained the lower court in its ruling excluding this question from the evidence. This case is a peculiarly strong one. Counsel for defendant had introduced testimony to show the manner in which a bank of earth was shored up before the accident. These witnesses testified that no other circumstances of weakness than those guarded against had been seen. It was then that the plaintiff sought to show the changes after the accident. In commenting upon the ruling as to this evidence, the court says: "As we are of opinion that, in any aspect of the case, the questions put to the plaintiff's witnesses were properly excluded, the order must be, exceptions overruled."

The plaintiffs had claimed that the question which they asked with regard to the precautions after the accident would tend to discredit the testimony of the witnesses for the defendant and to the effect that no other circumstances of weakness than those guarded against were observable in the bank of earth.

In Barber Asphalt Paving Co. vs. Odasz, supra, the plaintiff sought to introduce evidence to show that the track on which the sand car of the defendant ran was capable of a construction which would prevent accidents. The court says: "The testimony was wanted by plaintiff's counsel for the purpose of proving negligence. The answer showed the jury that changes had been made after the accident for the purpose of preventing similar calamities in the future. A plausible but untrue inference from this class of testimony is apt to be that the subsequent act, for the purpose of securing perfect safety in the light of past experience, is an admission of a previous omission to take proper precautions, and has the effect to call the minds of the jury away from the real issue, which is that of reasonable but not extraordinary care at the time of the accident, in view, among other considerations, of previous experience.

In Hodges vs. Percival, 132 Ill., 53, the line is sharply drawn and the court held that evidence could be introduced to show that there were valuable appliances known to the defendant, which he did not employ at the time of the accident, but that such ground would not justify the

introduction of testimony to the effect that the plaintiff had adopted such appliances after the accident.

In the leading case of Nolley vs. Hartford Carpet Co., 51 Conn., 526, where the rule against the introduction of subsequent repairs was laid down after the consideration of all the earlier cases, the court said: "The only possible bearing which the evidence in question could have would be as an admission that the previous precautions were insufficient and negligent." In this case the evidence was not sought to be introduced purely to show prior negligence, but was sought to be brought into the case in rebuttal of the testimony of the defendants that a certain door could not have been broken open without violence.

It will be seen, therefore, that in numerous cases, where various reasons have been invoked to justify the introduction of evidence of repairs, the courts have decided that the only real purpose such evidence could serve in such cases would be to show the prior negligence of the defendant. The real reason for the exclusion of the evidence is not alone, therefore, its lack of probative value, but also the liability of such evidence to cause confusion of issue and unfair prejudice in the minds of the jury. We have seen above in the cases cited that even where the evidence was sought for the express purpose of showing the condition of a place prior to and at the time of the accident, testimony of repairs was not allowed.

It is on this ground that the trial court allowed evidence of the changes in the tank at Goodwin to go before the jury.

The cases above cited show that, even upon this apparently legal pretext, the evidence was not admissible. The reason of this rule is emphatically against the allowing of such testimony for any purpose. That it does, and must, have its effect upon the jury in establishing negligence is open and obvious from the precautions which have been taken to prevent them from considering it under any circumstances.

"Where incompetent evidence has been introduced, and it cannot be told how much it prejudices the defendants, the judgment should be reversed." Railroad Co. vs. Hawthorne, 104 U. S., 202.

There are certain cases in which evidence of subsequent repairs has been admitted for a limited purpose; but in these the court has always observed a strict adherence to the rule that the defendant must not be prejudiced by such

admission in any manner. For example, these admissions have been allowed in Massachusetts, to show that the party repairing exercises dominion of the *locus in quo*. The tendency of the courts to allow such evidence, even for this limited purpose, however, is on the wane, and such evidence is not allowable where the fact can be otherwise established.

To summarize: The holdings of the courts upon the subject of the admissibility or exclusion of evidence of repairs after the accident, the following rules may be laid down:

First—Such evidence is not admissible to show negligence of the defendant, because it has no probative value.

Second—Such evidence is not to be admitted, because it tends to prejudice the minds of the jury, and to produce confusion of issue.

Third—The concurrence of these two reasons prevent such evidence from being introduced upon any pretext, even where it is claimed that the purpose of such evidence is not to show negligence upon the part of the defendant.

These rules being established, it was manifest and reversible error to allow the questions propounded by the plaintiff to Messrs. Poole and Sayers to go before the jury.

ASSIGNMENTS XI., XII., XIII., XIV., XV., XVI. AND XVII.

All of the above assignments may be discussed together, since they all depend upon the same principles of law, and, necessarily, in the discussion of the validity of one all of them are embraced. They are as follows:

XI.

The court erred in charging the jury as follows: "But if you find, from the evidence, that his death was caused by a collision with the overhanging waterspout, either by a blow sufficient of itself to kill him, or by being so dazed and disconcerted by a blow from the spout or the down-hanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas, which has been read in your hearing."

To this portion of His Honor's charge exception was duly taken by the defendant. (Record, p. 184.)

XII.

The court erred in charging the jury as follows: "I will not delay your consideration of this case by reviewing any argument of fact or law involved in it, since that has been so well done by counsel on either side, and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here takes the responsibility, as once before in another case, to decide that it is negligence in itself for a railroad to so construct such appliances as that which we have before us, that they will injure the brakemen upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe for the brakemen on the train is a conviction of negligence. Therefore, I submit the case to you upon the plain propositions above mentioned. I repeat—

"First—Was McDade killed by a collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

"Second—Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident?

"If you find both of these propositions in favor of the plaintiffs they should recover."

To which exception was taken at the time by the defendant. (Record, p. 185.)

XIII.

The court erred in refusing the following special instruction, to-wit: "I. B.—The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin Station; that is, to so construct it that it would not necessarily endanger its employes, whose duties required them to pass by it; but, as between the defendant and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general

use; in order that the plaintiff may recover in this case it is necessary for the plaintiff to convince you, by the preponderance of evidence, that the construction and location of the water tank, or its appliances, were not in general use throughout the country. So, if you believe, from the evidence, that the defendant did use ordinary care and prudence in the selection and arrangement and care of the water tank at Goodwin Station, and that such a tank was one which, in the experience of the railroad business was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and, hence, is the test of what is ordinary care." (Record, p. 190.)

XIV.

The court erred in refusing the special instruction No. 2, requested by the defendant, which is as follows: "Where there are several methods in general use, it being a matter of judgment, depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and machinery which are in general use in the business; so, if you believe, from the evidence, that on some railroads the sway spouts of tanks were hung in a vertical position, and upon other well regulated railroads the sway spouts upon water tanks were hung at an angle similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law, and no matter whether the deceased was killed by coming in contact with the spout or not, there can be no recovery in this case." (Record, p. 191.)

XV.

The court erred in refusing the third special instruction requested by the defendant, which is as follows:

"The defendant did not undertake with McDade that it would use the very water tank and appliances, nor was the defendant called upon to discard the same, if it was reasonably suited for his business, though there were other water

tanks that were safer; if you believe from the evidence that this tank and its appliances were reasonably suitable for the business and reasonably safe, you should find for the defendant." (Record, p. 191.)

XVI.

The court erred in refusing to give in charge defendant's special instruction No. 4, which is as follows:

"If you believe, from the evidence, that the sway spouts upon the various well regulated railroads of this country were hung at different angles, and projected toward the track at different distances; and you likewise believe, from the evidence, that the method of hanging the sway spout at Goodwin was in common use by many of the well regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use." (Record, p. 225.)

XVII.

The court erred in refusing to give in charge the defendant's special instruction No. 5, which is as follows:

"It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as with reasonable care on the part of the servant can be used without danger to him, except such danger as is incident to the business in which such instrumentalities are employed; so, also, it is the duty of the master to provide a reasonably safe place in which the servant can do his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such cases the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his services without exposure to dangers

that are not within the obvious scope of his employment as usually carried on. The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method. Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume the unusual and extraordinary risks which the master knew or should have known or foreseen, unless such risks are obvious, or the servant has actual knowledge or presumed knowledge of the danger. It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the service in which he engages; and it is likewise his duty to protect himself against known dangers and such dangers as he can by the use of ordinary care ascertain; and this duty is just as imperative upon him as that laid upon the master." (Record, p. 192.)

ARGUMENT.

The court erred in charging, as set forth in assignments XI. and XII., that if the bare fact that McDade was struck by the sway spout was proven, that then this was negligence, *per se*, and the plaintiffs were entitled to recover unless the defendant proved, by the preponderance of the evidence, that the deceased was guilty of contributory negligence. We have in assignment No. I fully discussed this question and there contended that upon principle and authority there was no negligence upon the part of the defendant in so constructing its water tank and sway spout at Goodwin Station, and we there cited the great weight of authority, which supports our contention.

There are few, if any, of the cases that go to the length of holding that merely the construction of a projecting structure in such a manner that it may possibly knock a brakeman from a train, is negligence, *per se*, irrespective of the facts and circumstances of the particular case. It will be noticed in the case at bar the court broadly charges that all that the plaintiffs need prove in order to convict the defendant of negligence is merely the fact that McDade was knocked from the car by the sway spout. We admit that there are cases which hold that under particular cir-

cumstances it is negligent for a railroad company to so construct its structures as to endanger the lives of its employes, but we know of no case that holds this, irrespective of the facts, and the examination of the cases will bear us out in this contention; thus in the following cases it was held to be a question for the jury: Gates vs. Railroad, 4 S. D., 433; Railroad vs. Markey, Tex., 19 S. W., 392; Kelleher vs. Railway, 80 Wis., 584; Piddock vs. Railway, 5 Utah, 612; Allen vs. Railway, 57 Iowa, 623; Railway vs. Burton, 97 Ala., 240.

The most that can be made out of the case, Railroad vs. Mortenson, 11 C. C. A., 335, by the plaintiff is that it is for the jury to say whether or not the maintenance of such structures is negligence upon the part of the defendant according to the circumstances of the particular case, and hence, if this honorable court does not adopt our view that it is not negligence upon the part of the defendant to maintain such a structure, we contend that it will hold that it was not negligence, *per se*, and that the lower court erred in so charging. The Mortenson case uses this language: "The principal questions discussed by counsel are: (1) Was it negligence for the company to maintain a bridge having overhead tie-beams too low to admit of the safe passage of a brakeman standing on the running board of a furniture car in the discharge of his duties when no warning of the dangerous character of the bridge was given by telltales or otherwise? (2) Was the brakeman guilty of contributory negligence in not ascertaining by measurements or observations, that he could not pass safely while standing on the running boards of a furniture car. Under the evidence in this case these were not questions of law, but questions of facts for the jury.

The court erred in refusing the special instructions set forth in assignments XIII., XIV., XV., XVI. and XVII.

Special instruction No. 1b, set forth in assignment XIII., was taken almost literally from the cases of Reid vs. Stockmyer, and Logging Co. vs. Snyder.

Special instruction number eleven, set forth in assignment XIV., was taken almost literally from Seeley vs. Railroad, 152 U. S., and Bailey on Master and Servant, Section 114, where this language is used: "Where several appliances are in use each of which is regarded by men of skill and experience as safe and proper, the master may not be made liable where in selecting the appliances which

cause the injury to his servant, he took the one which, according to his judgment, and that of skilled men in his employ, was the best. It is culpable negligence, not an error of judgment, which imposes liability." See, also, Bailey, Vol. 1, Sec. 222; also Sec. 227; to the same effect see Holley vs. the Railroad, 142 N. Y., p. 31; Seffinfield Street Railway Co., 91 Cal., 48; Kehler vs. Schwenk, 144 Pa. State, 348.

This special instruction is likewise supported by Reid vs. Stockmyer, supra; for therein it is stated that the master may, however, conduct his business in the way that seems to him best, although the other ways may be less hazardous.

The court erred in refusing the third special instruction requested by the defendant, which is set forth in assignment XV., for the reason that this special instruction sets forth the well settled rule of law that only reasonable care is required of the master. This instruction was taken literally from Bailey, Vol I., Section 75.

The court erred in refusing to give special instruction number four, which is made the subject of assignment No. XVI. This is taken literally from Section 75, Bailey on Master and Servant.

The court erred also in declining special instruction number five, set forth in assignment XVI. This instruction was taken from Reid vs. Stockmyer, supra.

XVIII.

The court erred in refusing to give the defendant's special instruction number six, in its original form, and likewise erred in modifying it. Said special instruction number six, in its original form, was as follows:

"If you believe, from the evidence, that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law, as above given you, that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew, or by the exercise of ordinary care should have known, of the danger incident to the construction and location of the sway spout, and that after he knew, or by the exercise of ordinary care should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk

of whatever defects there were in the construction and location of the tank and its appliances, and there can be no recovery in the case."

The court gave this instruction to the jury, with this addition and modification immediately following its conclusion, to-wit: "But the given danger must have been one open to ordinary observation, and not one lurking or hidden from the view."

The court erred in modifying this instruction as set forth above, for the court thereby left it to the jury to say, in the first place, whether or not the danger from the tank was obvious, while, as discussed above, we contend that reasonable men should not have differed upon that proposition, but that it was manifestly so.

Again, in the special instruction, as set forth in its original form, the jury are instructed to find for the defendant if they believe that McDade was an experienced brakeman, and that he knew, or by the exercise of ordinary care should have known, of the danger incident to the construction and location of the sway spout, etc., while the court, by interpolation of the above modification negatives this idea by stating that the danger must be one open to ordinary observation. Now, the danger may frequently be open to the observation of an experienced railroad man, and yet not open to ordinary observation in the sense of being plain to the casual observer.

Again, as set forth in Reid vs. Stockmyer, the servant on his part assumes the natural and ordinary risks attendant upon his employment, and assumes also all unusual and extraordinary risks if they are obvious, or the servant has actual or presumed knowledge of the danger. Here, we submit, this was a risk manifestly incident to the employment of McDade, since he was obliged to come in contact with this machinery every day in passing and repassing Goodwin Station. Consequently, as set forth in Reid vs. Stockmyer, it was the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he was engaged, but by the modification above set forth, the court, by implication, charges the jury that the servant need not use ordinary care to ascertain such dangers when such danger is lurking or hidden from view.

XIX.

The court erred in refusing to give in charge the eighth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars, the sway spout at Goodwin Station, hung as it was hung prior to the death of McDade; and if you likewise believe, from the evidence, that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so."

XX.

The court erred in refusing to give the ninth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that the deceased, McDade, had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin Station prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to passing underneath the sway spout upon freight cars, and with this knowledge continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection, the court charges you that knowledge is either actual or presumed, that is, in the law McDade is presumed to have had knowledge of those facts which he should have known by the exercise of ordinary care."

These assignments specifically set forth the rule of equal knowledge, and were taken almost literally from Bailey's Personal Injuries Relating to Master and Servant, Secs. 775 and 777. Nowhere in the court's charge is this phase of the case discussed, yet we submit that these instructions embody a correct exposition of the law, and the rule of law that was truly applicable to the case at bar. We likewise contend that upon the admitted evidence in this case, if these instructions had been given, the jury would have been forced to have found in favor of the defendant.

XXI.

The court erred in refusing to give the tenth special instruction requested by the defendant in its original form, and in giving it as modified. The tenth special instruction was as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that prior to his death he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of the road as well as the tanks on the eastern division of the road were constructed similar to the construction of the Goodwin tank; and that the sway spouts upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe, from the evidence, that he should have had this knowledge, and with this knowledge continued in the service of the defendant company, then he is presumed to have assumed the risks, and there can be no recovery in this case. In this connection, the court likewise charges you that you may take into consideration the frequency or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction by striking out the words "similar to" and adding thereto the words, "precisely as found in." The court likewise interpolated after the words "determine" the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of

the road, as well as the tanks on the eastern division of the road, were constructed precisely as found in the construction of the Goodwin tank, and that the sway spouts from all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine from his observation or experience while engaged in the business of the company the dangers incident to passing underneath them upon freight cars."

By the modification as above set forth, on the tenth special instruction, the court committed error, for it charged the jury in effect that they could only consider the fact that McDade frequently passed other tanks on the C., O. & G. R. R., and daily came in contact with them as bearing upon the question of his presumed knowledge of the dangers incident to the sway spout at Goodwin, if the jury believed that the angles at which other sway spouts were hung *were precisely* the same as the angle, that at least it was a question for the jury to say whether or not knowledge should have been presumed upon the part of McDade, even if the angles at which the sway spouts hung were not identical, but similar. Of course, it is very improbable that the sway spouts upon all of these tanks were hung to the fraction of an inch identical, but yet, if they were hung at very similar angles, certainly the person passing and repassing them, and riding under them upon the tops of freight cars should have gained some idea from them by which to determine whether or not the sway spout at the Goodwin tank would endanger him.

XXII. AND XXIII.

The court erred in refusing to give the twelfth special instruction requested by the defendant, and which is as follows:

"If you believe, from the evidence, that the sway spout at Goodwin Station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe, from the evidence, that neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII.

The court erred in refusing to give defendant's thirteenth special request, which is as follows:

"The defendant is not liable for an injury sustained by its servants in the course of his employment when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence."

Assignment 22 embodies the twelfth special instruction, which calls for the application of the rule that where neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, that then there can be no recovery. This instruction was taken literally from Bailey on Master and Servant, Vol. I., Sec. 785, and, as above discussed, was peculiarly applicable to this case, if the theory of the plaintiff was adopted by the jury; for certainly if McDade could not have, by the exercise of ordinary care, become aware of the dangers incident to the construction and location of the tank, although he passed there daily, then manifestly the defendant below could not have discovered it by the use of ordinary care.

The defendant's thirteenth special instruction has already been discussed under assignments 19 and 20.

XXIV., XXV., XXVI. and XXVII.

The court erred in refusing to give the sixteenth special instruction requested by the defendant, which is as follows: "The defendant, in the erection, construction and location of the Goodwin tank, was only required to use reasonable care to furnish a safe tank that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their parts; so, if you believe, from the evidence, that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting, or standing on the car, then you should find for the defendant."

XXV.

The court erred in refusing to give in charge the seventeenth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him and he was thereby injured, then he is guilty of contributory negligence and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI.

The court erred in refusing to give in charge the eighteenth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which were perfectly safe and one of which was subject to danger or risk, he voluntarily chose the latter and was injured, he was guilty of contributory negligence and cannot recover."

XXVII.

The court erred in refusing the nineteenth special instruction requested by the defendant, which is as follows: "While the evidence shows that on ordinary occasions it is customary for brakemen to sit upon the side of the car, you are to say, from the evidence, whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question, you should take into consideration all the facts in the case. If you believe, from the evidence, that the engine whistled for Goodwin tank; that McDade had been over the road many times before, and had passed Goodwin tank; that he had an opportunity to observe the dangers and risks incident to the way in which the spout was hanging, and, if you likewise believe that an ordinarily prudent man situated as McDade was situated would have observed such risks and dangers, and you likewise believe that an ordinarily prudent man from his familiarity with the road and the signals given should have known and recollected that he was passing the Goodwin tank, and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position

with perfect safety, and, in fact, from all the facts and circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence."

These assignments embody special instructions 16, 17, 18 and 19, which were refused by the court, and are based upon that phase of the case relative to the contributory negligence of the deceased. It is true that in the general charge the court did charge the jury, on page 218 of the Record, that if McDade either knew of the danger by the illumination of the headlight or by his previous knowledge of the condition of the road in respect to this water tank, and its overhanging spout, or if he might have known it by the exercise of that due care which an ordinarily prudent brakeman should use to inform himself of the obvious dangers of his particular employment on that road, then the plaintiff cannot recover.

But we submit that in this instruction to the jury the court limited the contributory negligence of McDade to the question of his knowledge of the danger, and upon that branch of the case we contend that the court nowhere instructed the jury with regard to the particular position that McDade assumed in passing the water spout, which was a direct issue in the case.

Again, the court failed to charge the well-settled rule as set forth in assignment 25, to the effect, that where the servant knowingly selected a dangerous place when a safer place was apparent to him, that this charges him with contributory negligence, and assignment 26 is practically to the same effect.

Assignment 27 embodies the evidence as shown by the undisputed facts in the case in an assumed case, and then instructs the jury that they are to say, from this evidence, whether or not McDade was guilty of contributory negligence. We submit that the very function of the special instruction is to call the jury's attention to the particular facts of the case, and then give them the rules of law applicable thereto, and likewise contend that it is error for a trial judge to refuse the embodiment of a correct rule of law based upon the facts proven in the case, and set forth in a special instruction, although the court may have properly charged the general rule of law; for juries are not learned in the law, and while laymen of in-

telligence are able to understand a special instruction which charges the result of a certain state of facts if proven, yet when the court merely gives general principles, they frequently are unable to apply them.

In conclusion, we submit that an affirmance of this case would violate not only a number of well-settled rules of law, but would likewise leave the determination of the adoption of methods of business, not to the judgment of men of ordinary prudence in the railroad business, but to the hypercriticism of so-called "experts."

In brief, this is a case where the deceased assumed all of the risks incident to the business as carried on by the defendant company, and cannot complain, even if that method of business was less safe than others that might be adopted.

J. W. McLOUD,
GEO. B. PETERS,
E. E. WRIGHT,
C. M. BRYAN.

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Supreme Court of the United States

October Term, 1902.

No. 288 26

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,

vs.

LAURA LOUISE McDADE, LUCY W. McDADE and KINNEY McDADE, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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IN THE

Supreme Court of the United States

October Term, 1902.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,

vs. No. 288.

LAURA LOUISE M'DADE, *et al.*, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

THE FACTS.

On August 19, about 1:30 a. m., the deceased, John I. McDade, was killed while in the discharge of his duty as head brakeman on a freight train of plaintiff in error, as said train was passing through Goodwin, Ark., a station on the main line of railroad owned and operated by plaintiff in error.

The evidence clearly conduces to show that the deceased, while sitting on the side of one of the cars in said train, at his post of duty as head brakeman, and in a proper position for receiving and passing signals as the train was running by a station, was knocked off said car by coming

in contact with a large galvanized iron spout attached to and a part of the water tank at Goodwin, Ark., which tank and its appliances were so negligently constructed and maintained as to cause the said spout to hang at such an angle toward the railroad track as to be unnecessarily dangerous to brakemen, whose duties compelled them to be on top of freight trains, especially when passing through stations.

This iron spout was in the nature of a concealed danger, in that it cleared some freight cars and persons on them, but came so close to others, such as furniture cars, as to be within striking distance of a brakeman, who might reasonably be expected at times, in the proper discharge of his duty, to be sitting on the top of such a car and on the side thereof next to this tank, when a train containing such car or cars was passing it going west, for the head brakeman would then be on the same side as the engineer, to whom he had to pass signals, and, therefore, in the best position to do what was expected of him by the company.

Record, pp. 46, 47, 50, 56, 58, 86, 87.

On the night of August 18, about 9:30 o'clock, a freight train consisting of an engine and twenty-seven freight cars, left Memphis, the eastern terminus of the Choctaw, Oklahoma & Guf Railroad. This train was bound for the west.

Record, p. 117.

The crew of the said train consisted of Conductor C. A. Hollowell, Engineer Robert Church, a fireman and two brakemen, namely, the deceased, John I. McDade, as head brakeman, and W. D. Kennedy as rear brakeman.

Record, pp. 39, 82 and 83.

At Forrest City, Ark., which was reached about 12:10 a. m., August 19, the conductor of said train gave the head brakeman (the deceased) orders to be delivered by him to the engineer to go ahead of train No. 3 to Brinkley, the first station west of Goodwin, inasmuch as a passenger train was following close behind said freight train.

Record, pp. 39, 59, 82, 85.

Leaving Forrest City the go-ahead signal was passed. The next station west of Forrest City was Palestine, where

the same signals were passed and the train went through this station without stopping and proceeded at a rapid rate of speed toward Goodwin, Ark., which was the next station. At this latter station, on the north side of the main track, on which this freight train was running, there was a railroad water tank, which will be more particularly described later. When the train approached Goodwin, the engineer blew the whistle at a point between one-fourth and one-half of a mile from this tank. The conductor, who was in the cupola of the caboose, looking west, gave with his lantern the signal to go ahead, which signal was passed by the rear brakeman to the head brakeman (the deceased) and by the latter passed to the engineer, who answered with a short blast of the whistle.

Record, pp. 39, 41, 83, 149, 150, 151.

The train did not check up at all, and when it passed the Goodwin tank the train was running at a speed of between twenty and twenty-five miles an hour.

Record, pp. 85, 150, 152.

At the time that these signals were being given to go through Goodwin without stopping, the deceased, as head brakeman, was sitting on the north edge of a car which was situated in said train at the distance of about eight or ten car lengths from the engine. Kennedy, the rear brakeman, was two or three cars from the caboose, and the conductor, as before stated, was in the cupola of said caboose looking west. The engineer was on the north side; that is, on the right-hand side of his engine as it was going west, and was looking back to get the signals from the head brakeman.

Record, pp. 41, 42, 83, 84, 149-151.

The uncontroverted evidence is, that it was the positive duty of the brakeman to be on top of trains as they were passing through stations, and that it is not only customary for them to sit on top of the car, but that they are supposed to be on the same side with the engineer, to whom the signals are communicated. (Record, pp. 46, 47, 56, 83, 86.)

It is further proved that where there are furniture cars in a train, the brakeman is in a better position to give

signals to the engineer when on one side of said cars, which are higher than the ordinary car and would, if intervening between the brakeman and the engineer, obstruct the view of each, and thus make it more difficult to transmit signals.

Record, pp. 58, 86, 87.

The proof clearly establishes, that at the time these signals were being given, as this train was passing through Goodwin, the deceased was in the most favorable position, to-wit, on top of the car where he could best discharge the duties of head brakeman, and that he did, in fact, pass said signals while in such position and was seen discharging this duty by the rear brakeman, conductor and engineer of said train.

Record, pp. 42, 46, 47, 56, 58, 86, 87, 93, 149, 150 and 151.

The evidence further shows, that on account of the orders which had been given, in view of the fact that a passenger train was following close behind, it was necessary for the head brakeman to be unusually attentive and watchful for signals from the conductor and rear brakeman, so that he might promptly catch any signal which might be given him and pass the same to the engineer.

Record, pp. 59, 60, 82, 83, 85.

When the train reached Brinkley station, nine miles west of Goodwin, the deceased was missed by the rear brakeman and conductor, who thereupon instituted a search for him. They got up on top of the train and found the lantern of deceased near the west end and north side of a furniture car situated in said train about the tenth car from the engine. The lantern was still burning. (Record, p. 93.)

It was right near the hand-hold and in a circular place made in the car for a lantern in order to keep it from falling off. The grab-iron, or hand-hold, was situated five or six inches from the west end of the car, and about twelve inches from the north side of the car, the lantern being just back of this grab-iron.

Record, pp. 40, 47, 93.

The undisputed testimony is that it is customary, when

a train is passing through a station, for the brakeman to sit on the side of the car, where he can best give signals to the engineer, and to sit near this grab-iron, or hand-hold, so that he can hold on to it while giving the signal. (Record, pp. 47, 48.)

The car on which this lantern of deceased was found was Illinois Central furniture car No. 28,149, and the stipulation of counsel contains the following: "The total height of car is either 14 feet or 14 feet 1 inch, that is, the furniture car on which plaintiff was injured." (Record, p. 102.)

It is further stipulated that the eaves of the car were between 13 and 14 feet in height. (Record, p. 183.)

As tending to show that the deceased was sitting on the north side and near the west end of this particular furniture car where his lantern, still burning, was found at Brinkley, when the train passed the Goodwin tank, we refer to the following excerpts from the testimony of the train crew:

Q. "You say, Mr. Hollowell, as the train was pulling into Goodwin going west, on this night at 1:20 a. m., August 19, 1900, you were in the cupola of the caboose looking west, and that the engineer gave the whistle and you gave the signal to go on?"

A. "Yes, sir."

Q. "This signal, you say, was communicated by the rear brakeman to the head brakeman, and by him to the engineer?"

A. "Yes, sir."

Q. "And you personally saw these signals given?"

A. "Yes, sir."

Q. "And the head brakeman, as you stated, was John I. McDade?"

A. "Yes, sir."

Q. "On which side of the car was he sitting?"

A. "On the right-hand side."

Q. "How far was the train from the water tank at Goodwin when this signal was given by Mr. McDade to go ahead?"

A. "Between a fourth and half a mile."

Q. "To the best of your knowledge and belief, from your seeing him give the signals, you think that he was facing north *on this furniture car where his lantern was found at Brinkley?*"

A. "Yes, sir."

See testimony of C. A. Hollowell, Record, pp. 41, 42, 50.

Engineer Robert Church testified as follows:

Q. "Before you got to Goodwin tank, did you receive any signals from Mr. McDade, or from the head brakeman?"

A. "Yes, sir; I received a signal from the caboose and *one from where his lantern was found*—supposed to have been him, and should have been him."

Q. "You received one from the head brakeman, whoever that was?"

A. "Yes, sir."

Q. "You saw the lantern waving from the side of the car?"

A. "Yes, sir; the lamp was not down on the side; it was from the top, the edge."

Q. "The eaves of the car?"

A. "Yes, sir."

Q. "The lantern was really out from the car waving; you could see it?"

A. "Oh, yes; I seen it by leaning out of the side window as usual."

Q. "You saw this lantern being waved by the head brakeman just beyond the edge of the car?"

A. "Yes, sir."

Q. "On the same side you were on?"

A. "Yes, sir."

Record, pp. 149, 150.

The following is an excerpt from the testimony of W. D. Kennedy:

Q. "Now, as to the position of Mr. Hollowell, the conductor, yourself and Mr. McDade, at the time

this go-ahead signal was being given, after the train whistled for Goodwin."

A. "Well, I was in the caboose before we got to Goodwin, and it is customary—well, it is the rule—that we are supposed to be out on top, passing through all stations. Before he whistled I entered the cupola on my side and went out on top and got out on top, and when he whistled I looked back. Hollowell raised his lamp and gave the signal. I raised my lamp and gave the signal and McDade did the same. As soon as that whistle stopped we began to give the signal and then went through Goodwin."

Q. "Were you on the caboose?"

A. "I was about the third car from the caboose."

Q. "Did you see his lantern moving?"

A. "Yes, sir."

Q. "Where was the lantern?"

A. "The lantern seemed to be moving on the side of the car; he seemed to be giving the signals on the side of the car."

Q. "On which side of the car?"

A. "Right-hand side."

Record, pp. 83 and 84.

Four furniture cars of similar size intervened between the car on which the lantern of deceased was found and the engine, and the proof shows, that under these circumstances, the most favorable position for the head brakeman, in order to pass the signals to the engineer is to be on the right-hand side of one of said cars. (Record, pp. 86, 87, 116, 117, 118.)

No other traces of deceased could be found at Brinkley, except his lighted lantern.

The fact that deceased was missing was reported promptly to headquarters, and directions were given to keep a lookout for him. His body was found by the crew of passenger train No. 2, eastward bound, which reached Goodwin at 3:34 a. m., August 19. When first discovered, he was lying on his right side, with his head somewhat resting under his body and beneath his head was a pool of

blood. This point was 675 feet west of the Goodwin tank, between the main track and a spur track, which is nine feet north of the main track there. He was facing west; his feet were six or eight inches from the ends of the cross ties of the main track and his head three or four feet from the ends of the ties of the spur track.

Record, pp. 146, 147, 161, 162.

The surface of the ground where the body lay and between that point and the tank was perfectly smooth and there were no rocks of any kind near the body. The ends of the cross ties and surface of the ground were carefully examined and no evidences of blood could be found anywhere, except the pool beneath his head, nor was there any evidence of his having been dragged at all. (Record, pp. 96, 97, 146, 163.)

The engineer who discovered him said:

"I looked with a torch to see if he had been dragged by the car, and I remarked to the conductor that he lay where he fell."

Record, p. 163.

The body was taken by this passenger train to Forrest City and turned over to Messrs. R. S. and A. L. Stevens, undertakers, who prepared same for burial, and it was sent to the widow of deceased, at Memphis, that night.

The undertakers testified that the remains bore evidences of a powerful blow on the chin, which was cut through to the bone, and that the jawbones on each side were completely crushed, and a wound on the left side of the head, and his shirt was quite bloody in front. (Record, p. 14.)

The evidence of Mrs. McDade and the physician who examined the remains when they reached Memphis show that, in addition to the above marks of violence, there was a scalp wound on the forehead, the teeth of deceased were knocked out, there was a very severe bruise on the *left* side of his head, the *left* ear being split and matter oozing out of same.

Record, pp. 16, 18, 19, 20.

There was not a scratch on his nose, nor was either of his arms broken. (Record, pp. 109, 111.)

Deceased entered the employ of plaintiff on June 15, 1900. He did not go to work on the Memphis division of its railroad, which embraced Godwin, Ark., until July 16, 1900, about four weeks before he was killed, and up to the time of his death he had made only eight or nine trips on this division, one-half of which were made in the night time.

Record, pp. 14, 15, 111, 118.

THE CONDITION OF THE WATER TANK APPLIANCES.

The water tank at Goodwin, Ark., is situated on the north side of the railroad, about four and a half feet from the track. At the time of the accident in question, it consisted of a large platform about 12 feet in height, on which was a large wooden tank, circular in shape. Near the south edge of the platform were attached two heavy upright beams, with a cross beam near the top of the uprights. To the under side of this cross-beam, near each end thereof, were firmly attached two iron pulleys, over which ran two chains, which were connected with a large galvanized iron spout near the center thereof; to the other ends of said chains there were attached two heavy iron weights, which rested on the platform when the spout was not in actual use. This spout was 14 inches in diameter at the lower end and about 10 inches in diameter at the upper end, which was of a goose-neck shape. Around the central part of this spout was a band, to which the chains above referred to were attached on the upper side, and to the under side of said band was attached a chain about the size of a trace chain, which, with the ring at the end, was 23 inches long. The lower end of this spout rested on what is known as the supply pipe, which is about 12 inches in diameter and extends from the tank to a point a little beyond the south end of the platform. When it is desired to supply an engine with water from this tank, the fireman or engineer takes hold of the 23-inch chain above mentioned, pulls the spout down to a horizontal position, the larger end thereof partially encircling the supply pipe, and thus the water passes from the tank into the tender of the engine. When a sufficient quantity has been taken, the

fireman releases his hold and the weights attached to the ends of the chains connected with the spout are sufficiently heavy to draw it back toward the upright beams, and if these chains are of the right length and the appliances properly constructed, the spout will necessarily be carried back to an almost perpendicular position, when the weights rest on the platform.

HOW THE SPOUT SHOULD HAVE HUNG.

All of the witnesses stated that it was intended that these appliances should be so adjusted that the spout, when not in use, would always clear a car and a person anywhere on top of same.

From the testimony of Conductor Hollowell, we quote the following:

Q. "On account of the different heights in the engines the water spout is pulled in different directions and left frequently in different positions?"

A. "It is always left in the upright position."

Q. "That is, it should be left in the upright position?"

A. "It can't be left any other way."

Q. "And if in proper position and working right, it will go back to the upright position?"

A. "Yes."

Record, pp. 52, 53.

Mr. R. H. Briggs, who has been in the railroad business for half a century and a master mechanic for thirty-eight years, now occupying that position with the Frisco (formerly Kansas City) system, which embraces several railroads, testified as follows in regard to the requirements of standard railway tanks and appliances:

"The spout is suspended on what we term a gallows frame; on the side next to the tank two chains run from the gallows frame over pulleys with a weight at one end and a spout at the other. The weights are sufficient to pull the spout back to a vertical position when not in use." (Record, p. 64.)

Further questioned:

Q. "You say that they are intended and constructed—the tank, water tanks—so that the spouts should be in a vertical position when not in use?"

A. "So that it will clear everything."

Q. "And what do you mean by everything?"

A. "Everything in the way of a car or a person on top."

Record, pp. 65, 72, 73, 74, 75

A. "If the spout does not go to the vertical position it shows that the chains are too long." (Record, p. 67.)

Further quoting:

Q. "Mr. Briggs, if the band to which the chains are attached are in proper position with reference to the spout, and the chains are of the right length, will the spout go back automatically?"

A. "It has to go back to a vertical position; it can't help it."

Q. "And the weights, are they to pull it back to that position?"

A. "Yes, sir."

Q. "Wouldn't make any difference how a fireman would leave it, if the appliances are in proper order it would go back to the proper position?"

A. "Yes, sir; of its own accord." (Record, p. 67.)

He also testified that if the slant of the spout was as much as 2 feet 8 inches in a length of 9 feet it would indicate that the chain was too long. (Record, pp. 67, 68.)

And further, that spouts on different tanks are intended to clear any car, with a brakeman sitting on the side thereof. And that he has frequently seen persons sitting on the same side of the car as the tank, passing these tanks of standard variety, without harm. (Record, pp. 72, 73, 74, 75.

W. D. Kennedy, brakeman in the employ of plaintiff in error, testified that the spout is supposed to hang so as to clear a man on the car. (Record, pp. 87, 88, 89, 90.)

R. B. Herring, an engineer on the Kansas City, Memphis and Birmingham railroad, introduced as a witness by plaintiff in error, testified on cross-examination as follows:

Q. "How do they (meaning the spouts) hang with reference to the cars? They are intended to clear the cars all right, are they not?"

A. "Yes, sir."

Q. "To clear the car if anyone is sitting on the side of it?"

A. "Yes, sir."

Q. "If they don't hang high enough above the edge of the car when the brakeman is sitting on the side, they don't hang in the correct or proper position?"

A. "I have never seen one but what did."

Q. "All you have seen hung high enough above the edge of the cars to clear a man?"

A. "Yes, sir."

Q. "It is known that brakemen are bound to be on top of the cars, is it not?"

A. "Yes, sir."

Q. "That is their duty and they ride sitting on the side of the cars, and all the tanks you have ever observed on any other road hang sufficiently high above the highest car that is used in a train to clear it and a man sitting on the side?"

A. "Yes, sir; when they are in proper condition."

Q. "They have two weights attached to two chains attached to a pulley?"

A. "Yes, sir."

Q. "When the chains are of proper length and the weights are sufficiently heavy, when the fireman gets through, it goes back up nearly straight?"

A. "Yes, sir."

Record, pp. 121, 122.

To the same effect is the testimony of W. W. Sherwood and Robert Church, both employes of the plaintiff in error.

Record, pp. 147, 148, 152.

F. A. Luce, general superintendent of the water service of the defendant railroad company, and who had charge of the repairs of water tanks at the time deceased was killed, testified as follows:

Q. "You said there was an ordinary standard. I am asking you for the ordinary construction in your well managed railroads."

A. "The weights are designed to carry those spouts back away from the cars."

Q. "And they ordinarily are constructed so as to be entirely free from any danger of contact with the cars?"

A. "Yes, sir."

Q. "That is the way they are used ordinarily on all roads, so that when not in use they clear the car and the brakeman riding on it?"

A. "Yes, sir."

Q. "The brakemen are supposed to ride either standing or sitting on the edge of the car?"

A. "It depends on circumstances."

Q. "They do do that?"

A. "Yes, sir."

Q. "And they are so construed that a brakeman sitting on the side of the car—that the sway pipe will swing back so it will clear the car with a person on it?"

A. "Yes, sir."

Record, pp. 138, 139, 140, 142.

From the testimony of J. P. Pool, foreman of bridges and buildings, we take the following excerpts:

Q. "How high should the pipe you speak of hang immediately over the eaves? That is, drop a line perpendicular or draw a line from the end of the eaves of the car straight up to where it would strike the pipe?"

A. "*I would consider it standard if it cleared all cars four feet.*"

Q. "And unless it did, it would not conform to what you would consider a standard pipe and tank? That is, your idea of how it should be constructed?"

A. "Four feet on a perpendicular line above the eaves of the car to the pipe." (Record, p. 170.)

HOW THE SPOUT REALLY HUNG ON ACCOUNT OF UNSUITABLE APPLIANCES.

Let us now see how far the actual condition of the spout and appliances, on the night of the accident, differed from what it should have been in order to be up to the standard of safety established by the undisputed testimony.

Conductor Hollowell testified on this point, that one had to be careful to keep out of the way of the spout at Goodwin tank.

Record, pp. 44, 45.

Further questioned:

Q. "And the iron water spout on the tank at Goodwin at this time would come probably within 18 inches or 2 feet of the top edge of a furniture car?"

A. "Yes, sir."

Q. "What is the average height of a person sitting on the edge of a car; an average man?"

A. "An average man on a car ought to be 2½ feet."

Record, p. 52.

According to the evidence, deceased was 6 feet 1 inch in height, and when sitting on a car his chin would be two to three feet above the top of the car. (Record, pp. 17, 52, 88, 89.

W. D. Kennedy, brakeman, testified that when sitting on the side of an *ordinary* freight car, this spout at Goodwin tank would miss his head 6 to 20 inches. (Record, pp. 90, 91, 92.)

He further said: "This tank (meaning spout) will

clear a man on an ordinary car, and on a furniture car he would have to look out for the chains hanging down. I don't know that it would hit a man or not." (Record, p. 87.)

A furniture car is 18 inches to 2 feet higher than the ordinary freight car. (Record, p. 42.)

W. J. Jordan, a resident of Goodwin, testified, that before the accident this spout hung 2½ to 3 feet above the edge of a freight car passing under it. (Record, p. 26.)

Robert Church, engineer, testified that the spout on the night of the accident cleared the eaves of the cab of his engine a couple of feet; that the eaves of his cab were 13 feet from the rail. (Record, pp. 153, 159, 160.)

It is agreed that the eaves of the furniture car on which the lantern of deceased was found, were between 13 and 14 feet in height. A man 6 feet tall, sitting on the eaves of this furniture car, must, therefore have been struck by this spout, according to the testimony of the engineer. This physical fact can be established to a mathematical certainty.

Mr. G. P. Walker, a reliable merchant at Goodwin, a wholly disinterested witness, stated that for some time prior to August 18, 1900, the spout in question hung at a very considerable angle. (Record, pp. 78, 79, 94, 95.)

That two weeks after the accident, before any change had been made in the tank or its appliances, in company with and at the request of the assistant claim agent of plaintiff in error, he made certain measurements at this tank, as follows:

Height of supply pipe above ground, 12 feet; distance to center of nearest rail from the lower end of a line dropped perpendicularly to the ground from the neck of the supply pipe, 4 feet 3 inches. (Record, pp. 77, 78, 79.)

This distance, according to defendant's evidence, was 4 feet 6½ inches. (Record, p. 166.)

Distance to center of nearest rail from point on ground which would be the terminus of a line dropped perpendicularly to ground from higher end of spout, when in its

usual position with chains taut and weights resting on platform, 4½ inches.

According to defendant's evidence, this measurement was 6 inches. (Record, pp. 77, 78, 79, 129, 130.)

In order to be safe, this distance should be at least 15 inches.

Record, p. 176.

The spout was 14 inches in diameter at the lower end and 10 inches in diameter at the upper end, and was 9 feet long; but one witness for defendant stated that it was 8 feet 10 inches long. (Record, pp. 128, 129, 167.)

Now, taking the figures most favorably to, and submitted by the defendant company, and we have a spout 8 feet 10 inches long, of the diameter above specified, resting on a supply pipe 12 feet in height, the distance to the nearest rail from bottom of a perpendicular line dropped from the edge of the supply pipe being 4 feet 6½ inches, and the distance from the bottom of a line dropped perpendicularly to the ground from the top of the spout when in its natural position, not in use, 6 inches. This would necessarily fix the exact angle of the spout, which would be such as to cause the central part of said spout to hang not more than 2 feet 2 inches immediately above the eaves of a car of the size and dimensions of the furniture car on which deceased was riding at the time he was injured, namely: a car whose height to the eaves was between 13 and 14 feet, whose width, inside measurement, was 9 feet. A car of this width would project 2 feet 4 inches beyond the rails, the eaves extend 4 inches beyond the sides, and the sides being about 2 inches thick, would make the width of the car from eave to eave 10 feet. (Record, pp. 170, 171, 179, 181.)

The height of the rails above the ground is at least 6 inches. Now, take a car 13 feet in height to the eaves, which is the lowest limit specified in the agreement as to the dimensions of the car, a person sitting on the north side of such a car when passing by this tank would necessarily be struck by the spout, the central portion of which would come at least six inches below the top of his head. This is not speculation, but a demonstration.

REPLY TO ASSIGNMENTS OF ERROR.

I.

The first error assigned is, that the court erred in affirming the action of the circuit court in refusing to grant the request of defendant below for a peremptory instruction to the jury in its favor. This assignment is based upon four propositions, namely:

1. That there was not sufficient evidence to go to the jury on the question as to whether the deceased was killed by coming in contact with the spout connected with the Goodwin tank.

2. That there was no negligence in the construction and maintenance of the water tank and appliances.

3. That deceased assumed the risk.

4. That deceased was guilty of contributory negligence.

In answer to the first proposition, it is hardly necessary to do more than refer to the testimony above quoted. There was ample evidence tending to show that when the train passed the Goodwin tank the deceased was sitting on the north side of the furniture car on which his lighted lantern was found, and the iron spout on the tank at Goodwin at this time was hanging at such an angle toward the train as *necessarily* to strike the left side of the head of deceased when sitting on the side of this car and facing north. The character of his injuries clearly indicates that he received a powerful blow from some blunt instrument on the *left* side of his head, the fact that he fell, as it were, in a heap, on a smooth surface; that there was no evidence of his having struck a cross tie, or of his having been dragged; that neither of his arms were broken, which would reasonably have occurred if he had fallen from the car while conscious, in view of the natural effort which would have been made to protect himself by throwing out his arms; the improbability that the combination of traumatic injuries which he received could have been produced by his simply falling from the moving train; the improbability that he would have fallen from the train while he was sitting, as the evidence tends to show he was, right by

the hand-hold, or grab-iron, by means of which he could have saved himself from such an accident—all these, and other circumstances in the record, tend to establish with reasonable certainty that the deceased was struck by some blunt instrument as he was sitting on top of the car, in the discharge of his duty, as the train passed by this tank at Goodwin; and, as this iron spout suspended from this tank was unquestionably the only thing in a position to strike him at that time, the jury was fully justified in so finding. The fact that his body was found 675 feet west of the tank in no way weakens the force of this conclusion. Sitting, as the evidence tends to show he was, near the west end of the furniture car facing north, the iron spout would have struck him on the left side of his head and would naturally have knocked him back on the car toward the east, and the vibration of the car would have caused his lifeless body to roll off. This train was running between 20 and 25 miles per hour, and at this rate of speed it required only about 19 seconds to go 675 feet. It is certainly reasonable to suppose that this short time would have elapsed before the body of the deceased, after having been knocked back on the car by the blow from the spout, would have fallen from the car on account of the natural vibration of the fast-moving train.

It certainly cannot be said that fair-minded men could not have reached the conclusion which the jury arrived at in this case. Under the instructions given by the circuit court, the jury would certainly not have done the defendant the injustice of basing a verdict upon mere conjecture, or of finding liability against it, "where the probabilities were as easily reconcilable with freedom from fault as the contrary."

The circuit court charged the jury as follows: "If, after weighing the whole testimony, you find that it is equally probable that the deceased was killed by falling from the train without any agency from the spout and chain in his taking off, plaintiff cannot recover; that is to say, if the proof is so equally balanced that you cannot determine whether McDade was killed through any contributory agency of the spout or chain, the plaintiff cannot recover." (Record, pp. 185, 186.)

This was emphasized in defendant's special instruc-

tion No. 1 A, given by the circuit court in charge to the jury. (Record, p. 190.)

The court fairly summarized the facts in the opinion delivered by Judge Lurton, and the record fully supports the conclusion contained in the following excerpt:

> "While it cannot be said the evidence demonstrates that the deceased was caused to fall from his post by reason of a waterspout at Goodwin, yet, the facts and circumstances pointing to that conclusion were quite sufficient to justify a verdict based upon such an assumption. We have reached this conclusion from an attentive examination of the evidence, and are content to state this result, without burdening this opinion with the details, or an argument based on facts of interest only to the particular litigants here concerned. So far as the motion for an instruction to find for the plaintiff in error was based upon the supposed insufficiency of the evidence in respect to the operativeness of the waterspout as a proximate factor in causing the death of the deceased, it was rightly denied."

See Opinion of Court, Record, p. 232.

NEGLIGENCE IN THE CONSTRUCTION AND MAINTENANCE OF WATER TANK APPLIANCES.

As to the second proposition on which counsel for plaintiff in error relies, we think the proof is absolutely conclusive that the defendant was guilty of negligence in the matter of the construction and maintenance of the spout and appliances at the Goodwin tank. The testimony is undisputed that all of these spouts are intended to clear a brakeman anywhere on top of a car of any height that may be carried by the railroad company in any of its trains. Defendant, according to the testimony of its own witnesses, knew that in order to make this spout and appliances reasonably safe and up to the standard adopted by all railroads, the spout should clear all cars immediately above the eaves at least four feet. (Record, pp. 169, 170, 175 and 176.

The evidence established, almost beyond reasonable doubt, that at the time deceased was killed this spout was hanging so dangerously near to passing trains, as to be within striking distance of a brakeman, who was in the discharge of his duty, sitting on the north side of one of a certain type of cars frequently carried by defendant in its trains. Proper inspection by the railroad company would have caused this danger to be ascertained and removed. All that was necessary was to shorten the chains which connected with the spout at one end and with the weights at the other; or the same result could have been accomplished by elevating the cross beam through which the pulleys, over which these chains run, were attached. This method was adopted after the accident. It was gross and culpable negligence in the railroad company to subject its employes to a risk so great and so absolutely unnecessary, while faithfully discharging the duties imposed on them and indulging the belief, as they had a right to do, that no danger was to be apprehended by them from these spouts, which were supposed to hang, as the proof shows, in such a position as to be free from peril to brakemen on top of the trains. In this connection, we also refer to the eleventh assignment of error, which is based upon the following excerpt from the Circuit Court's charge to the jury:

> "But if you find from the evidence that his death was caused by a collision with the overhanging water spout, either by a blow sufficient of itself to kill him, or by being dazed and disconcerted by a blow from the spout or the down-hanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas which has been read in your hearing."

This portion of the charge was modified by the following clause, which was really a part of the instruction above quoted, and without which the above cannot be fairly considered:

> "*Unless* you further find from the evidence in the case, that McDade either knew of the danger of collision with the water spout or chain, or by the observ-

ance of ordinary care while working for the road, or by such care on this particular occasion, might have known of the danger. In that event, his widow and children could not recover, for it would be his own fault not to protect himself against the danger."

Record, p. 185.

As applicable to the concrete case, we think the first portion of this charge, which constitutes the basis of the eleventh assignment of error, is entirely correct. If the defendant railroad company permitted this spout to hang at such an angle as to strike and kill one of its employes, when in the discharge of his duty as brakeman, and when in the exercise of ordinary care, Could reasonable, fair-minded men differ as to whether or not this constituted negligence on the part of the railroad company, especially when it was shown by the undisputed testimony that such a danger was unnecessary and could have been removed by the mere process of shortening the chains by which the spout was suspended? How easy it would have been for the defendant to have ascertained and removed this needless peril, and failing to do so, it was certainly guilty of such negligence as evinced a disregard of the safety of those who operated its trains, and especially of the brakemen, whose duty required them to be on top of trains when passing through stations and who had nothing whatever to do with the handling or using of the water tank appliances.

"Where the evidence is so conclusive against defendant on the question of its negligence, that the jury could not reasonably find to the contrary, the court may so instruct them, leaving them to determine the plaintiff's negligence where the evidence is conflicting."

Delaware, L. & W. R. R. Co. vs. Converse, 139 U. S., 469.

The court is sutained, both by reason and authority, in disposing of the second proposition, as follows:

"2. In respect to the question of the negligence of the railroad company the court instructed the jury in regard to the maintenance of a water-spout in such a situation as to be liable to strike brakemen in the discharge of their duty, 'that it is negligence of itself

for a railroad to so construct such appliances as that we have before us that they will injure the brakemen at work upon its trains.'

"This was excepted to and has been assigned as error. Many requests for charges involving the duty of the employer to the employe in respect to safety of appliances and places for work were also refused, not because they were not law in the abstract, but because inconsistent with the instruction in respect to the peculiar case which had been already given. If, upon all the facts and circumstances in evidence, the jury could not reasonably have come to any other conclusion but that it was negligence to maintain a waterspout in such proximity to the track as to endanger employes, whose duty required them to be on top of passing trains, the court was justified in the peremptory instruction given, and it was not error to either give the instruction we have set out or to refuse those which dealt with the question in the abstract.

"Railroading is an occupation essentially dangerous, and the general principle is, that railroad employes undertake all the risks of the employment which are usually incident to the occupation.

"But such employes do not assume the risk of the negligence of the company itself. Among the duties which devolve upon the company is that of exercising ordinary care in furnishing its employes with proper road-bed, track and other structures and appliances upon which and with which the service required may be rendered. In the discharge of this general duty the master must not expose his servants when in the performance of their duty to perils or hazards against which they may be guarded by the exercise of ordinary care and diligence upon the part of the master. These principles are so well settled as to only need statement. Union Pacific Railroad vs. O'Brien, 161 U. S., 451; Hough vs. Railway Company, 100 U. S., 213; Reed vs. Stockmeyer, 20 C. C. A., 383; Clow & Sons vs. Boltz, 34 C. C. A., 550; Felton vs. Bullard, 37 C. C. A., 1; Mason & O. Ry. Co. vs. Yockey, 43 C. C. A., 228.

"In Reed vs. Stockmeyer, cited above, the Seventh

Circuit Court of Appeals, speaking by Circuit Judge Jenkins, said:

"'So, also, it is the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the perfomance of like hazardous service, so that the servant exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on.'

"The conclusive evidence was that such swinging spouts should be so constructed as to clear cars without endangering employes in the discharge of their duties on the roof of passing trains. To do this it was, perhaps, not always necessary or customary that the spouts should, when not pulled down, hang in a position absolutely vertical to the tank. But on all of the evidence, it was made to appear most conclusively that they should not be placed in such close proximity to the track, or hang, when not in use, at such an angle as to endanger employes in the proper discharge of their duties on the top of passing trains.

"It may be that the evidence was conflicting as to whether this particular spout was a peril to brakemen on top of cars of the usual height. But it was in evidence that cars built to carry furniture are somewhat higher above the track and somewhat wider than ordinary freight cars, and that such cars were well known in the traffic and frequently found in the trains on this railroad.

"The evidence clearly established that neither

necessity or convenience required that such spouts should be so constructed as to constitute a dangerous obstruction to employes on any cars known to the traffic. Judge Hammond, who tried the case in the circuit court, upon this subject, summed up the law very tersely by saying to the jury, in justification of his instruction, that:

" 'It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot-rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence.'

"It was the duty of the company to use ordinary care to see that the dangers incident to the employment were not unnecessarily enlarged, and the servant thereby exposed to perils which could have been guarded against by the exercise of that degree of care due to employes. The unusual and unnecessary projection of buildings, posts, cattle-guards, etc., over a track, or so near as to endanger employes in the discharge of their duties, has been generally regarded as negligence. Dorsey vs. The Construction Company, 42 Wis. 583; Colf vs. Chicago, etc., Rd., Co., 87 Wis. 273; Missouri Pac. R. Co. vs. Somers, 78 Texas 439; Geo. Pac. R. Co. vs. Davis, 92 Ala. 300; Scanlon vs. Boston A. R. Co., 147 Mass., 484; Chicago & Iowa Rd. Co. vs. Russell, 91 Ill. 298; 5th Ed. Sherman & Redfield's Law of Negligence, Section 201.

"If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging water-spouts in such proximity to passing cars as to endanger employes standing or sitting on the roof of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however unnecessary such dangerous proximity might be.

"But we are not called upon to decide such a question, for the conclusive evidence in this case was that neither necessity nor convenience required the main-

tenance of such spouts in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify un unnecessarily dangerous projection of the kind in question.

"There was, on the evidence in this case, no error in instructing the jury that if the deceased was struck by the tank spout at Goodwin while on the roof of a passing car, that the fact would convict the company of negligence."

Opinion of Court (Record, pp. 232 to 234.)

If the jury found that deceased was killed by coming in contact with this spout, while in the discharge of his duty, could reasonable men differ, under the facts and circumstances of this case, as to whether the construction or maintenance of the said spout and appliances in such an unnecessarily dangerous position, would constitute negligence for which the company would be liable, unless the deceased had assumed the risk arising therefrom, or was guilty of contributory negligence? And on the question of assumed risk, the circuit court went further in its charge in favor of the plaintiff in error than the law warranted. In addition to the clause above quoted, the circuit court charged the jury that if the deceased knew of the danger at the time, "*or might have known it, if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident*," plaintiffs could not recover. (Record, pp. 185, 186.)

The same proposition was reiterated and made even stronger in defendant's special instructions Nos. 6, 7, 10, 11, 14 and 15, all of which were given by the court in the charge to the jury. Special request No. 11 is as follows:

"If you believe from the evidence that a person of McDade's experience and opportunities for observation should, by the exercise of ordinary care, have foreseen that the use of the Goodwin tank, as it existed before his death, would or could have been reasonably expected to have resulted in injury to a person situated as he was situated, upon the night of the accident, then the plaintiff cannot recover." (Record, p. 195.)

Special request No. 14 is as follows:

"The defendant had a right to expect, and it was the duty of McDade that he would use reasonable care to examine his surroundings and all of those appliances of the road, from which, by the use of ordinary care, he should have known might have endangered his safety, and the defendant has a right to rely upon the probability that anyone would know what was generally to be seen of his *own observation.*" (*Record*, p. 195.)

In charging the jury in accordance with these requests, the Circuit Court was more favorable to plaintiff in error than the law justified.

In the case of Texas Pacific Ry. Co. vs. Archibald, 170 U. S., 665, the Supreme Court of the United States clearly stated the principles which are controlling in the case at bar. The railway company assigned error on the refusal of the trial court to give the second and third requested charges, which were as follows:

"If you believe that the defendant company has car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was coupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew *or by the exercise of ordinary care could have known* that it was the custom of the defendant company not to inspect cars that were brought in, as they were to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover.

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of the defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom *or could have known it by the ex-*

ercise of ordinary care, then he assumed the risk of being injured by any defect in said car, and cannot recover."

In regard thereto, Justice White, delivering the opinion of the court, said:

"These requests the court gave, except in the *first it omitted the words therein italicized, that is*, 'by the exercise of ordinary care could have known,' and the second, 'or could have known it by the exercise of ordinary care.' The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employe has a right to rely upon the duty being performed, and that while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employe with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employe receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for and no authority exists supporting the contention that an employe, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risk of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employe assumes the risks usually incident to the employment. The employe on the other hand has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordi-

nary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employe is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employe, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages the employe may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and while this does not justify an employe in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances.

"In Missouri Pacific Railway vs. Lehmberg, 75 Tex., 61, 67, the court considered a refusal to give a requested construction, that if there were any patent defects in the engine or tank and deceased knew, or might by ordinary diligence have known of same, and said defects caused or contributed to the injuries complained of, the jury should find for defendants. The court said:

"'Without now considering the question whether the rule in this respect charges an employe with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with

knowledge of such only as are open to his observation. Beyond that, he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances.'

"Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employe to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employe know, or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just sated the trial court not only did not err in striking out parts of the instructions which were asked, but the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by the true legal principles." (170 U. S., 665, 671-674.)

In the case of Gusman et al. vs. the R. R. Co. (La., 1897), 11 A. & E. R. R. Cas. (new series), 643, deceased, a brakeman, was killed by coming in contact with a beam of an overhead bridge, which it was claimed was too low to permit a brakeman standing erect on a box car to pass beneath it in safety. The only allegation of negligence on behalf of the defendant was having the beam so near the top of the cars. In was contended by defendants, that in the allegations of the petition no cause of action was disclosed, for the reason that it was one of the assumed risks of decedent's employment, he having knowledge of the height of said beam and its position. The Supreme Court of Louisiana reversed the lower court, which sustained defendant's exception to the petition, and announced the following to be the law applicable to the case on the authority of Shear. and R. Neg. (4 Ed.), Sec. 198; Beach Contributory Neg., Sec. 134; and Patt. Ry. Acc. Law, Sec. 289: '(1) That an overhead beam across the track of a railway company, which is too low for a brakeman to pass beneath while standing upon the top of the car is an essentially mur-

derous contrivance; and its maintenance, especially after it has become useless, is gross negligence; (2) the risk of injury from such an obstruction is not assumed by an employe, where the dangerous apparatus was under the control of the employer, who could easily have removed it and whose duty it was to have done so. * * * While the proposition, that it is not negligence in a railroad company to construct, or permit to be constructed, overhanging bridges, etc., over its tracks so low as not to permit a brakeman to stand upright on top of a box car, might be true in some special case, under exceptional circumstances, it is certainly not true as a general proposition. On the other hand, were it true, that if the brakeman knew, or was presumed to know of the existence of such construction, he would be held as a general rule to have assumed the risk of injury therefrom, it is not true that the fact of such knowledge carries with it necessarily and on all occasions and under all circumstances, the cutting off of the remedy for injuries received by him from such construction.' "

In the case of the Chicago & A. R. Co. vs. Stephens (Supreme Court of Ill., Feb. 20, 1901), 59 N. E., 577; s. c. 20 Am. & Eng. R. R. Cas. (new series), 182, the court in its opinion stated the facts to be as follows:

"The undoubted evidence is that at the place of injury, about half a mile north of Tallula Station, a coal chute had been maintained on the east side of defendant's track for about six years. The main part of the structure was 28½ inches east of the ladders of passing freight trains; but there was a footboard attached thereto some 7 feet from the ground, extending toward the track, which was 12 inches wide, the outer edge being only 16½ inches from such ladders. Some of the witnesses called this a 'running board' and others a 'foot board,' it being used for the employes of the coal company to stand upon in operating the chute to deliver coal to the engines of the defendant, and there is no evidence tending to prove that the trainmen had any connection whatever with operating the coal chute. At the time of the accident the deceased was descending a ladder in the ordinary and usual manner

and was struck about the hips by the projecting board above described and thrown from the ladder to the ground, receiving injuries which resulted in his death. That these facts fairly tend to show that the structure was so near to the railroad track as to render it dangerous to those operating freight trains in the usual and ordinary manner, cannot, we think, be seriously questioned. In fact, we are at a loss to perceive how, under the proof in this record, it can be said that the evidence does not fairly establish that fact. The accident itself certainly tends to prove it. The burden of the argument of the counsel for the appellant is upon the question, whether the evidence proves, or fairly tends to prove, the other material allegations of the declaration, that the deceased was himself, at the time he received his injury, in the exercise of due care. He had been in the service of the defendant company as a head brakeman on freight trains twenty-eight days and had made several trips passing the coal chute where he was injured, his train stopping at this place, as is contended by the defendant, often to coal. In the forenoon of August 30, 1897, the conductor of the train, on the platform at Tallula Station, after the train was in motion going northward, gave him a message to be delivered to the engineer to stop the train at Five Points, the next station, about 2½ miles north, for the purpose of unloading a car of cinders. He at once climbed to the top of the rear car and went forward to the front of it, where he attempted to descend the ladder in order to reach a flat car next to the box car between him and the engineer, where he was struck as above stated. There was offered in evidence a rule of the company which counsel for appellant insists made it the duty of employes of the company operating freight trains to descend ladders on the opposite side of the box car being at the rear end, and, of course, so removed from the flat car that the latter could not be reached by it. We do not understand counsel to claim that the deceased was not, at the time of his injury, in the performance of duty in attempting to obey the order of the conductor, or that he was not in the exercise of ordinary care in so doing, except in that he descended the ladder at a time when he was liable to come

in contact with the coal chute; but the position is that he knew, or was charged with knowledge of the fact, that to descend the car when opposite the structure was dangerous. It is true that the evidence shows, that immediately before descending the ladder he recognized and waived his hand to a young lady near the track, or, as appellant claims, he himself admits that he was fooling with a girl. While that testimony might tend to show that he was not giving attention to his duty or that he was negligent in that regard, it certainly could not be claimed, and we do not understand that it is contended, that that fact would, as a matter of law, establish negligence. * * * If it be conceded that there was evidence before the jury in this case from which they might reasonably have found that the deceased knew, or ought to have known the dangerous proximity of the structure to the ladders upon freight cars, still it cannot, from that evidence, be said that he was chargeable with such negligence as a matter of law. The length of time he had been in the service of the company, the number of times he had passed the place, the number of times his train had stopped there for the purpose of taking coal, and the rule of the company, were all facts and circumstances tending to charge him with the knowledge. The fact that he was in the performance of his duty, which required promptness in reaching the engineer, the facilities afforded him for accomplishing that purpose, the nature of his duties as a brakeman, the fact that he had nothing to do with the use of the coal chute in taking the coal when trains stopped there for that purpose, were facts and circumstances properly to be considered by the jury, tending to prove that he did not know and was not chargeable with any knowledge of the danger. It is impossible for us to say, upon all this evidence, that he was or was not so chargeable. That was the province of the jury in the first instance, subject only to the review by the appellate court. The judgment of the appellate court will be affirmed."

The same doctrine is announced in Ry. Co. vs. Woodruff, 66 Ga., 707; Brown vs. N. Y. C. & H. R. R. Co. (N. Y. 1901), 60 N. E. 1107.

In Chicago, etc., R. R. Co. vs. Russell, 91 Ill., 298 it was held to be culpable negligence on the part of the railroad to permit a telegraph pole to stand for three years so near the track that it was within 18 inches of passing freight trains. The switchman, who is charged with making up trains, was injured by striking a switch stand within 9 or 10 inches of the train when moving on the track. Held, that the risk of injury arising from such cause was not assumed by the switchman. Pidcock vs. Union Pacific R. R., 5 Utah, 612; s. c. 1 L. R. A., 131.

An employe does not assume the risk arising from the erection and maintenance of a switch stand and target of such height and in such position and condition that the target will sometimes come in contact with the sides of the cars of passing trains; particularly when such employe of the company knows that the rules of the company prohibit the erection of any such switch stand within less than 6 feet of the track. (Boss vs. Northern Pacific R. R. Co., 2 N. Dak., 128; 49 N. W., 265.)

In the case of the Houston & Texas Ry. Co. vs. Oram, 49 Tex., 241, plaintiff, 'who was a brakeman and baggage master on the Houston & Texas Central Ry. Co., while attending to his duties as brakeman and ascending a side ladder of a car, was knocked off by a projection from over a water tank belonging to the company. The tank was closer than usual to the road; the frame work not far enough from the side of the car to allow a man to ascend the car with safety. It was Oram's duty to be at the brake at the stopping place and not to await the signals. He was going to his place in obeyance of the signal, in haste. The engineer did not check the speed of the train, which was moving from 12 to 14 miles per hour.' * * * There were ladders on each side and end of the cars; the injury would not have happened had Oram gone by any of the other ladders. The court said: 'That the company is responsible if the injury was caused by the improper construction of the road, tank, or cars, without any carelessness or negligence on the part of the plaintiff, is not contested. The law is believed to be

settled, that it is the duty of the railroad company to use ordinary care to provide such cars, roadbed, tanks, etc., as are reasonably safe; that a failure to do this is negligence charged on the company itself; and that the company is responsible in damages to an employe for an injury resulting, without his negligence, from a tank or other appendage to the road so negligently constructed as to subject the employe to an unnecessary and extraordinary danger which he would not reasonably anticipate or know of, and of which he in fact was not informed.' "

The Circuit Court charged fully on the subject of contributory negligence. (Record, pp. 185, 186.)

Under the facts of this case, the jury were warranted in finding that the death of deceased was caused solely by the negligence of the defendant.

The dangers which needlessly imperil human life and which can be removed at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the railroad to remove and, as long as the needless peril is maintained, the employer is guilty of culpable negligence. The testimony in this case clearly shows that the deceased, at the time the train passed the Goodwin tank, was in the discharge of his duties, which compelled him to be on top of the cars to receive and transmit signals and when necessary to operate the brake. That the orders which had been given him by the conductor at Forrest City to deliver to the engineer, to go ahead of another train at Brinkley, and the fact that another passenger train was following close in the rear of said freight train when it passed Goodwin, made him unusually attentive to his duties, the proper discharge of which required constant and unremitting application of all his faculties. It was necessary for him to keep his eyes on the conductor or rear brakeman and be ready to receive and transmit signals to the engineer. His duty and the safety of the train demanded this.

Where a railroad company erected cattle chutes so near its track that a brakeman, while on the ladder of a box car, was struck by one of the chutes, the Supreme Court of Wisconsin, speaking by Chief Justice Ryan, said:

"If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom could excuse the danger. A positive acquiescence, *scienter*, of one so employed, might, indeed, take away his right of action for injury incurred by such a structure. But there is a public, as well as private, interest. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the State concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employes to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters. We use the word 'unnecessary' advisedly, distinguishing 'necessity' from 'convenience.' A convenience may be so great as to be regarded as a practical necessity. But a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains."

Dorsey vs. Construction Co., 42 Wis., 583.

In the same case the court said:

"The safety of railroad trains depends largely upon the exclusive attention of those operating them to the track, and to the trains themselves. It is not for the interest of railroad companies, or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And even with actual notice of the

dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train to their own safety in performing it."

The case at bar is stronger than the case last cited, for in that the brakeman, at the time he was killed, was not in the discharge of any duty which was calculated to absorb all his faculties. He was simply ascending or descending the ladder which led from the top of the box car Furthermore, in the case at bar, there is absolutely no proof that the deceased had any knowledge that the spout in question was hanging at such an angle as to be dangerous to a person on top of any of the cars used in defendant's train, nor was there any proof whatever that he had ever passed this tank while on top of a furniture car before the night he was killed, or that he knew that being on top of such car while passing said tank was at all dangerous.

In reference to the defense of contributory negligence, which was certainly not established by any proof, it should be observed, that where the injury results in instant death, as in this case, "the law, out of regard to the instinct of self-preservation, presumes that the deceased was at the time in the exercise of due care, and this presumption is not overthrown by the mere fact of injury. The burden rests upon the defendant to rebut this presumption." (Flynn vs. R. R. Co., 78 Mo., 195, 212.)

Even if the deceased had actually known that this spout was hanging in a dangerous position, but forgot this fact while absorbed in the discharge of his duties, it would still be for the jury to say whether, under all the circumstances, he was guilty of contributory negligence. On this point, we refer to the case of Mason & O. R. R. Co. vs. Yockey, 43 C. C. A., 228, in which Judge Day, delivering the opinion of the court, said:

"The only contributory negligence that could fairly be ascribed to him would be failing to observe the formation of ice upon the apron and stepping thereon. We think it was in the province of the jury to decide this question, in view of the engrossing nature of the fireman's duty, constantly repuiring his attention in its proper discharge."

The law will not permit a railroad company needlessly to erect and maintain structures that inflict on its employes the penalty of death for a "momentary thoughtlessness." It will be observed that the penalty is inflicted for a supposed momentary forgetfulness of himself and his own safety, not for a momentary forgetfulness of his duties and the safety of the train. Momentary thoughtlessness, however, is not proved in this case, but only assumed by the defendant as probable; but contributory negligence is never to be assumed or presumed. In the case of Southern Ry. Co. vs. Duvall (in the Court of Appeals of Kentucky, 1900), 56 S. W., 988, where the head brakeman was killed by coming in contact with an overhead bridge, the court said:

"But it is earnestly contended for appellant, that the decedent was guilty of such contributory negligence as to bar the right to recover. This contention has nothing to support it, except the fact that decedent must, of necessity, have known that the foreign car was higher than the others; hence it is argued that he should not have been on the car when the train went under the bridge. It is also suggested that there was no necessity for him to have been on the car at that time. It nowhere appears that his attention had been called to the car in question, which, in fact, had been put in the train for the first time that evening and night, and there is nothing to show that he knew that standing upon said car when passing under said bridge was dangerous to his life. It would be a harsh rule, indeed, that would require a brakeman to know the exact height of a foreign car placed in the train shortly before it started on its usual trip. It is also evident that a brakeman is not guilty of contributory negligence by simply remaining on top of the car, and the evidence in this case tends to show, that a few

minutes before the bridge was reached, it was necessary for him to be on top of some of the cars to adjust brakes."

See also Mexican Central Ry. Co. vs. Eckmann, 42 C. C. A., 344; Wood vs. L. & N. R. R Co., 11 Am. & Eng. R. R. Cas. (new series), 325.

The court was not in error in stating that:

"The questions of assumption of risk and of contributory negligence were properly left to the jury under a charge quite as favorable as the plaintiff in error could demand. Valley Ry. Co. vs. Keegan, 31 C. C. A., 255; Union Pacific Ry. Co. vs. O'Brien, 161 U. S., 451."

II.

It is next assigned as error that the court sustained the action of the Circuit Court in admitting over the objection of plaintiff in error certain testimony of Mrs. McDade as to the amount of wages the deceased was earning at the time of his death. We submit that this assignment is not well taken.

Under the statutes of Arkansas, in which State this cause of action arose, the measure of damages to be allowed the widow and next of kin is what the jury may "deem a fair and just compensation with reference to the pecuniary injuries resulting from the death" of the husband or father; and, according to the construction of the statute by the Supreme Court of Arkansas, "this compensation is to be determined by taking into consideration the age, health, habits, occupation, mental and physican capacity for and disposition to labor, and the probable increase or dimunition of that ability with the lapse of time; deceased's earning power, *rate of wages*, and the care and attention which one of his disposition and character may be expected to give to his family—all these are proper elements for the consideration of the jury in determining the value of the life taken." (53 Ark., 117.)

This testimony, as well as some other not objected to, tended to show that the deceased was earining $70 to $75

per month, practically all of which was spent on his wife and children, who were entirely dependent on him for support.

Record, pp. 15, 182, 183.

III.

The third assignment of error embraces six sub-assignments, based on six different exceptions to various portions of the testimony of C. A. Hollowell. It probably should not be considered at all, because in violation of Rule 11, adopted by the court. Each assignment should embrace a single exception.

> Clark vs. Deere & Mansur Co., 80 Fed., 534; U. S. *ex rel.* Coquard vs. Indian Grave Drainage Dist., 85 Fed., 928.

An examination of the record will show that certain parts of the testimony quoted in this assignment were not objected to at all, and only the most general objections were taken to any part of it. In no instance was any specific ground of objection stated.

1. In regard to the testimony cited under the first sub-assignment, p. 61 of brief, we submit that no error was committed by the court in admitting this. The witness was clearly giving his best impression in regard to the position of deceased at the time that he was giving the signals as the train was passing through Goodwin, and when he stated that he judged of this by the position of deceased's lamp and signals, he was clearly speaking of the lamp at the time the signal was given, not of its position as he saw it subsequently on the car. Only a general objection was made by defendant to the first question, and none to the answer above, and the question was certainly competent. (Record, p. 61.)

Besides, the same witness testified positively that he was looking at the deceased when he gave these signals, and that he was sitting on the right-hand side of the car. This portion of his testimony was not objected to. (Record, p. 42.)

2. It is next claimed that the court erred in admitting the following questions and answers:

Q. "How long had the tank been in the condition it was in the night that this train passed by?"

A. "As far as I know, ever since I have passed there."

Q. "State whether or not you ever made any observations of it personally?"

A. "Nothing, only to be careful to be out of the way of it."

Q. "You had to be careful to be out of the way of it, did you?"

A. "Yes, sir." (Record, p. 45.)

We think this evidence is competent as tending to show the position of the spout with reference to passing trains. Defendant could certainly not complain of this, in view of other testimony of its own witnesses, which showed that the spout hung within striking distance of a person on some of the cars carried in its trains.

3. The next sub-assignment of error relates to the admission of the following testimony:

Q. "State what is the usual custom of head brakemen on your road and others in regard to their position on the top of the car when passing stations."

A. "Well, there is no special position at all. They use their own pleasure in regard to that."

Q. "What custom, if any, exists with regard to sitting on the side of the car?"

A. "That is the customary position always of a person riding on top."

Q. "Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?"

A. "Well, I will answer that he was in the discharge of his duties."

Q. "He was, at the last time you saw him, in the proper discharge of his duties?"

A. "Yes, on top of the train, looking after the train."

The answer to the first question above quoted contained nothing of which the defendant could complain. It was entirely innocuous. The second question to which exception is now taken, was not objected to by defendant below. Not even a general objection was urged thereto.

Record, pp. 46, 62, 63.

Nor was the third question objected to. The record shows that the portion of the answer to the above question, which states that McDade was in the discharge of his duties, was objected to in a very general way, no specific ground of objection being stated. We think it was competent to show, that at the time the train was going into Goodwin, deceased was in the discharge of his duties as head brakeman. The last question quoted above and the answer thereto, on which so much stress is laid by the learned counsel for plaintiff in error in their brief (pp. 66 to 72), was not objected to at all, and hence the plaintiff in error is not in a position now to complain thereof. It will be noticed that the witnesses at no time stated, *over the objection of defendant*, that the deceased was in the *proper* discharge of his duties; neither was he asked for, nor did he give, an opinion, that a particular manner of performing such services was required of him in the discharge of his duties. This is the distinction recognized in the cases relied on by counsel, and we do not think that any part of the testimony, to which any legal objection was made by the defendant, contains the vice now attributed to it.

4. It is next claimed that the Circuit Court erred in admitting, over the objection of the defendant below, the following questions and answers:

Q. "State what his character was with reference to his efficiency or inefficiency, carelessness or prudence."

A. "He was always very careful in handling trains, doing work or anything of that kind."

In regard to this sub-assignment learned counsel for plaintiff in error state in their brief, at page 72 as follows:

> "The court allowed proof of the general reputation and character of the deceased with regard to carefulness and prudence to be considered by the jury, in determining whether deceased exercised due care at the time of the acicdent, which issue was one sharply drawn and earnestly debated."

This is exactly what the court did *not* do. When the above question was asked defendant below made a general objection thereto and the record shows the following ruling in regard thereto:

> "Judge Hammond—'The question is admitted as to his general reputation as a brakeman as to the estimate of damages, but for the purpose of showing whether on this particular occasion he was careless or careful in his habits, it is excluded.'" To the ruling of the court *plaintiff* excepted. (Record, p. 63.)

It will thus be seen that six pages of the elaborate brief (pp. 73 to 78) of the learned counsel for plaintiff in error, are devoted to a general objection made to the above testimony, which was sustained by the Circuit Court.

The testimony embraced in the fifth and sixth sub-assignments to which only a general objection was made by the defendant below was of a harmless nature, and substantially the same fact which it tends to establish was proven by other witnesses, without objection from the defendant below.

Besides, it should be remembered, in view of the fact that deceased met his death at night, while in the discharge of his duty on one of defendant's trains, it became necessary for plaintiffs to take the depositions of Conductor Hollowell and Rear Brakeman Kennedy, though still in the employ of the company. They should therefore be regarded, to some extent, at least, in the nature of adverse or unwilling witnesses, and a little more latitude allowed in their examination, in order to develop the real facts surrounding the death of deceased.

IV.

This assignment embraces three different exceptions, which involve distinct propositions. The first sub-assign ment contains five questions and answers of the witness Briggs, which it is insisted were admitted over the objection of the defendant below, but the record shows that only the last question and answer quoted on pages 80-81 of brief for plaintiff in error was objected to, and that only in a general way. This question and answer were unquestionably competent, as were also the preceding, which were not objected to. (Record, p. 65.)

On the same page of the brief is the following statement:

> "Again the witness (Briggs) admits that he was not familiar with the custom generally on well regulated roads throughout the United States, with regard to the construction of water tanks, but merely testifies what the construction of such tanks was upon the Kansas City system."

In reply to this, we quote the following from his testimony:

> Q. "Does your experience in railroad business, covering a period of 50 years, give you familiarity with the construction of water tanks sufficiently to enable you to testify as to what is the proper structure and what is the standard adopted by *various* railroads?"
>
> A. "I should say so myself." (Record, p. 65.)

It is shown, moreover, that he had been a master mechanic 38 years, and during the last ten years had had control of the water service on the Kansas City system. (Record, pp. 64, 66.)

2. In regard to the testimony quoted under this sub assignment, it is proper to say that the record shows that only a general objection was made to the first question, and that question was not answered, and no objection whatever was made to the other questions and answers quoted on page 81-82 of brief.

See Record, p. 66.

3. Only a general objection was made to any part of the testimony embraced in this specification and the witnesses testified substantially to the same fact elsewhere, without any objection whatever. (Record, pp. 67, 68, 72, 73.)

Apart, however, from the character of the objection made, we do not think the testimony of this witness is subject to the criticism made against it. He was an expert, entirely familiar with standard water tanks and appliances, and the method of constructing and maintaining them, and it was certainly competent to inquire of him how they should be constructed in order to be up to the standard adopted by railroads generally, and what kind of appliances were used in order to keep the spout in the right position, and the condition of such appliances when the spout hung otherwise than in a practicly vertical position when not in use. From the opinion of the court in the case of Hutchinson Cooperage Co. vs. Snyder (Circuit Ct. of Ap., 7th Circuit), 107 Fed. Rep,, 633, we quote the following:

> "The court permitted witnesses to testify that a machine like a model put in evidence was impracticable and dangerous. This, it was objected, was an invasion of the province of the jury. When, however, the subject is one concerning which an expert's testimony is proper, it is not a good ground of objection, that the opinion of a witness embraces the point to be decided by the jury. Transportation Line vs. Hope, 95 U. S., 269-279. And when the inquiry is, whether a machine is properly constructed, or is suitable for the use to which it is put, whether it can be operated without danger, or in what respects it will be dangerous to the one operating it, there can be no doubt that the testimony of experts will ordinarily be competent."

Citing a number of authorities.

V.

Only a general objection was made to the question and answer quoted in this specification, and apart from this

fact, we think the question was entirely competent, and, if this particular answer was evasive or indefinite, it is immaterial in view of other statements made by the witness, clearly showing that he actually saw the signal given by the deceased with his lantern, which, according to witness' best impression, was given on the side of the car. (Record, p. 84.)

Besides, this fact was established by plaintiff in error's engineer, Robert Church. (Record, pp. 149, 150.)

VI.-VII.

These assignments of error are based upon the admission of certain testimony of Drs. Smythe and Webb, set out on pages 87 to 89 of brief. The record shows that general objections were taken to only portions of this testimony; it should further be noted that neither of said witnesses were permitted to testify as to what produced the death of the deceased. (Record, p. 103.)

They simply testified as to the character of the instruments which would produce such injuries and whether or not all of the injuries received by the deceased could reasonably have been produced by a single blow. In reply to a question, Dr. Smythe said: "I am not supposed to answer whether the pipe did it or the ground did it." (Record, p. 106.)

The answer to the last question on page 87 of brief, now complained of, was certainly not injurious to the defendant, and, if error it contained, was of a harmless nature; and so with the answer to the first question on page 88 of brief.

The third specification on page 88 contains questions and answers which were not objected to at all by defendant below.

Record, pp. 105, 106.

Dr. Webb had personally examined the body of deceased and was familiar with the injuries which he had received, and it was certainly competent, therefore, for him to say whether such injuries as he had himself witnessed on the person of deceased could have been produced

by a single blow, or whether more than one blow was necessary. Besides, to the first question contained in specification 7, only a general objection was made. It was not answered in the manner shown on page 89 of brief. (Record, p. 109.) And the subsequent questions and answers set forth on said page 89 of brief, under this assignment, were not objected to at all. (Record, p. 110.)

VIII.-X.

These assignments of error are based on admissions of certain testimony brought out on the cross-examination of Frank Sayers and G. P. Pool, witnesses for the defendant, in regard to changes which were shown by these witnesses to have been made in the water tank appliances about two weeks after the accident. These changes consisted simply in elevating the cross beam, to which were attached pulleys, over which ran the chains connected with the spout at one end and with heavy weights at the other, which weights rested on the platform. The elevation of this cross beam had the same effect as shortening the chains and thus causing the spout to be pulled back to a nearly vertical position and making it clear the cars and any person on them. It should be noted that the fact of some change being made in these appliances subsequent to the accident was first developed by counsel for defendant in cross-examination of one of plaintiff's witnesses, W. J. Jordan, who was shown a photograph of said tank at Goodwin and asked whether or not it was a correct representation of the condition of said tank and appliances at the time of the accident, and when the witness replied that it was not, that the appliances had been changed since deceased was killed, counsel for defendant, over the objection of plaintiff, withdrew the photograph and declined to permit the jury to examine it.

Record, pp. 31, 32.

Besides, these very witnesses, Sayers and Pool, were introduced by the defendant for the purpose of showing the condition of said tank and appliances and giving certain measurements made by them, after the accident, and, in order to strengthen their testimony, they had been asked

on direct examination if any change whatever in the tank appliances had been made at the time these measurements were taken.

Record, pp. 126, 166.

Moreover, that the spout at this tank hung at such an angle as not to be dangerous to persons on passing trains.

The Circuit Court several times ruled out testimony tending to show changes made in these appliances after the accident, until it became absolutely necessary to show what this change was, in order to ascertain the actual condition of things at the time of the accident. In view of the testimony presented by defendant in regard to these measurements, which were made after the accident, plaintiffs were certainly entitled to show, that when the measurements were made, the appliances were not in the same condition as on the night of the accident, and to show what these changes were in order to arrive at the true condition of the appliances at the time deceased was injured. The testimony was expressly restricted by the court to this purpose. (Record, pp. 132, 134, 140, 141, 172, 173.)

In addition to the rulings of the Circuit Court, thus restricting this testimony, at the time it was admitted, the attention of the jury was especially called thereto in the following excerpt from the charge:

> "I shall not comment on the proof, because it is not necessary; but, as a precautionary warning, it is best to repeat what was said by the court so often during the progress of the trial, that you must not imply anything against the defendant company by reason of the fact that after this accident they made a reconstruction of these water tank appliances. The court kept that fact out of the proof as long as possible. But, in trying to decide the conflict of testimony about measurements by feet and inches, it became necessary to take notice of this change, in order to understand the value of the proof as to measurements. The fact of the change has no other bearing on the issue of this case than that; and, for the reason so often explained to you, you should give the fact no other force than that which is necessary for the explanation of distances."

Record, p. 186.

There are a number of well recognized exceptions to the general rule, that evidence of subsequent precautions and repairs is not admissible; as, for instance, where it directly tends to show conditions existing at the time of the injuries, or is in rebuttal of the testimony of defendant's witnesses or properly drawn out in their cross examination.

Wat. Damages for Per. Inj., p. 769.
Shinners vs. Proprietors of Locks & Canals, 154 Mass., 168, 171.
Christian vs. Minneapolis, 69 Minn., 53.
L. E., etc., R. R. Co. vs. Middlecoff, 150 Ill., 27.
Louisville, etc., R. Co. vs. Malone, 109 Ala., 509.

By elevating the cross beams three inches, the chains connecting the spout and weights were, in effect, shortened six inches, and the spout pulled back toward the tank to this extent, which would diminish the angle and cause the spout to hang about one foot higher immediateely over the eaves of the car than it did before the change was made. This evidence not only threw light upon the condition of these appliances at the time of the accident, but tended to rebut the evidence of the defendant, that at that time the spout and appliances conformed to the standard on well regulated railroads, and, as insisted on page 19 of counsels' brief, that it was necessary that the spout should hang in the position which characterized it at the time of the accident; "otherwise it would be most inconvenient, if not impossible, for the fireman or engineer to pull the spout down by the small chain attached thereto so as to put it in service."

If it was in the right position and conformed to the best standard, at the time of the accident, Why was this important change made two weeks later? Moreover, this evidence tended to show that it was entirely unnecessary for the spout to hang in the position it did at the time of the accident; for, so far as the proof shows, it served the purpose of the railroad company just as well after it was elevated as before.

This evidence also shows how easily defendant could have removed the deadly peril which lurked in this spout

and appliances, to brakemen in the discharge of their duty on its trains, at and before the time of the accident. It has been held that a witness who has testified to the proper condition of machinery at the time of an accident, may properly be asked to explain why, if this were true, repairs were made soon thereafter.

Brevier vs. Delaware, etc., Canal Co., 13 Hun. (N. Y.), 254.

"So, where it was alleged by the plaintiff and confirmed by his witnesses, that there was a depression in a railroad track at a particular point at the juncture of two rails, which was denied by defendant's witnesses and evidence was offered that shortly after the injury the defendant's workmen raised the point in question up to a level, such evidence was held competent."

Wat. Per. Inj., p. 770.
Kuhn vs. Wisconsin, etc., R. R. Co., 76 Ia., 67.

For the purpose of showing that an obstruction in the street was unnecessary, it has been held proper to show its removal after the accident.

Dillon vs. Raleigh, 124 N. C., 184.

The Circuit Court, however, as before stated, would not permit the jury to consider this evidence for any purpose other than as tending to show the actual condition of the appliances at the time of the accident.

Opinion of Court, Record, p. 234.

IX.

This assignment is based upon the action of the Circuit Court in sustaining the objection of plaintiffs to a question asked a witness of plaintiff in error, which called for his opinion as to whether deceased, after being struck by the spout, would have fallen off of the car before the train had gone 675 feet.This question was manifestly incompetent. Besides, the Record does not show what the answer of the witness would have been, and therefore no error can be predicated on this ruling of the Circuit Court.

ASSIGNMENTS XII. TO XXVII.

We deem it unnecessary to notice the remaining fifteen assignments of error, which are based upon refusals to instruct the jury as requested. In each instance, the exception to the Circuit Court's refusal to instruct the jury in accordance with said fifteen special requests was general. It will be found that each of these requests, not covered by the general charge, included propositions which were clearly unsound and, under such circumstances, the exception was insufficient to compel a re-examination in this court.

The Record shows that eight of the special instructions requested by plaintiff in error were given by the court.

Record, pp. 190-198.

An examination of these special requests and of the general charge will show that the Circuit Court stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles.

The deceased, at the time of his death, was only 27 years of age, in robust health, with an expectancy of thirty-six years. He was considered a first-class brakeman of excellent habits and high character, earning between $70 and $75 per month, with prospects of promotion. While at his post of duty he met his death, solely as the result of the inexcusable negligence of the defendant railroad company, which he had a right to assume would safeguard him against unnecessary dangers. He left a widow and three small children, who had been entirely dependent upon him for the material benefits and blessings of life. Under all the circumstances of this case, a verdict of five thousand dollars ($5,000) was one of which defendant should not complain. The court committed no error in affirming the judgment of the Circuit Court.

J. H. WATSON,

G. T. FITZHUGH,

Counsel for Defendants in Error.

Supreme Court of the United States.

No. 26.—October Term, 1903.

The Choctaw, Oklahoma and Gulf Railroad Company, Plaintiff in Error, vs. Laura Louise McDade, Lucy W. McDade and Kinney McDade, Defendants in Error.	In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 2, 1903.]

Mr. Justice Day delivered the opinion of the Court.

This was an action to recover for the death, by wrongful act, of John I. McDade, an employe of the Choctaw, Oklahoma and Gulf Railroad Company. The plaintiff recovered a judgment in the Circuit Court, which was affirmed in the Court of Appeals. (112 Fed. Rep. 888.)

There was evidence tending to show that McDade, a brakeman in the employ of the company, was killed on the night of August 19, 1900, while engaged in the discharge of his duties as head brakeman on a car in one of the company's trains. McDade was at his post of duty and when last seen was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at a rate of from twenty to twenty-five miles an hour. At Goodwin there was a water tank, having attached thereto an iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train, and upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about six hundred and seventy-five feet beyond the Goodwin tank. There was also testimony tending to show, from the location of the waterspout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging spout. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the car by less than the height of a man above the car when in position to perform the duties required of him.

There was no eyewitness as to the exact manner of the injury to McDade, and it is urged that the court below should have taken the case

from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given. Furniture cars, like the one on which McDade was riding, were received and transported over this road. There is testimony tending to show that a proper construction of the tank and appliances required the spout to hang vertically when not in use, and other testimony to the effect that when hung in this manner it would be difficult, if not impossible, for the fireman to pull down the spout in taking water, and that to hang it at an angle is, at least, a more convenient method of adjustment. Be this as it may, the testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. The testimony makes it equally clear that when on the furniture car, McDade, sitting at his post, would be likely to be struck by the spout in passing. It is undoubtedly true that many duties required of employes in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employe should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. (*Kelleher, Admr.*, v. *Milwaukee & Northern R. R. Co.*, 80 Wis. 584; *Georgia & Pacific R. R. Co.* v. *Davis*, 92 Ala. 300; 1 Shearman & Redfield on Negligence, 5th edition, section 201, and cases cited.)

We agree with the Circuit Court of Appeals in affirming the instructions upon this subject given by Judge Hammond to the jury, in which he said: "It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures and track to be used in the operation of the road.

(*Union Pacific R. R. Co.* v. *O'Brien*, 161 U. S. 451.) The spout might readily have been so constructed and hung as to be safe. As it was maintained it was a constant menace to the lives and limbs of employes whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence.

The court left to the jury the question of the assumption of risk upon the part of McDade with instructions which did not permit of recovery if he either knew of the danger of collision with the waterspout, or, by the observance of ordinary care upon his part, ought to have known of it. The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. (*Hough* v. *Railway Co.*, 100 U. S. 213; *Wabash R. R. Co.* v. *McDaniels*, 107 U. S. 454; *N. P. R. R. Co.* v. *Herbert*, 116 U. S. 642; *N. P. R. R. Co.* v. *Babcock*, 154 U. S. 190.) The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employe is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employe, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe. (*Texas & Pacific R. R. Co.* v. *Archibald*, 170 U. S. 665.)

There was testimony tending to show that McDade had been over the part of the road where the Goodwin tank was situated only a few times,

and that part of the trips were made in the night season, and also that the furniture cars were of unusual height as compared with those generally used in the transaction of the business of the company. Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evident as to require the jury to be instructed to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the determination of the jury.

Numerous exceptions were taken to the refusal of the court to charge in certain respects, but as the charge given was proper and pertinent to the facts and sufficiently comprehensive, it was not error to refuse such requests. The assignments of error as to the admission of testimony were nearly all based upon exceptions general in their character, and under the well-settled rule not reviewable here. (*Burton* v. *Driggs*, 20 Wall. 125; *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 400; *District of Columbia* v. *Woodbury*, 136 U. S. 462.)

The one of most gravity is as to the admission of testimony to show that after the accident the waterspout at Goodwin was reconstructed so as to be placed at a point farther removed from passing trains. Evidence having been introduced by the railroad company to show by measurements that the waterspout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon the subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant company by reason of the fact that after the accident such reconstruction of the spout was made, and that such change had no other bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence.

We find no error in the judgment of the Circuit Court of Appeals, and it is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.